Supreme Court, U.S.
FILED
04 11 23 FEB 22 2005

No.

IN THE

Supreme Court of the United States

LESLIE MORGAN, KENNETH STACKER, AND THEODORE BOLDIN, ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT, PETITIONERS

v.

UNITED PARCEL SERVICE OF AMERICA, INC., AND UNITED PARCEL SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May the Court of Appeals for the Eighth Circuit reject the Supreme Court's teaching on proof of pay discrimination in *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 111-112 (2002) thereby denying favorable judgment to a class of 500 black managers paid discriminatorily less than similarly situated white managers?

II. May the Court of Appeals for the Eighth Circuit reject the Supreme Court's ruling on relevant statistical analysis in promotion discrimination cases, *Watson v. Fort Worth Bank and Trust*, 487 U.S. 989 (1988), and deny 500 black managers judgment where the undisputed statistical proof conformed to unchallenged authority in *Emanuel v. Marsh*, 897 F.2d 1435 (8th Cir. 1990) and *Paxton v. Union Nat'l Bank*, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) proving promotion discrimination?

III. Should the Supreme Court overturn the Eighth Circuit's ruling in which the panel majority, contrary to the mandate of the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), weighed evidence to uphold an improper determination on summary judgment which dismissed the claims of 500 black managers?

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

CORPORATE DISCLOSURE STATEMENT

Petitioners represent a class of approximately 500 black managers and former managers who work or have worked for Respondent United Parcel Service in and after 1989. (*See* Certification Order at Cert. App. 81a-83a)[1] Respondents are American corporations engaged in the business of package delivery for individuals and businesses.

1. The parent company of United Parcel Service of America, Inc. is United Parcel Service, Inc. (a different corporation from appellee/cross-appellant United Parcel Service, Inc.).

2. The parent companies of United Parcel Service, Inc. are United Parcel Service Worldwide Forwarding, Inc.; United Parcel Service of America,

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[1]Citations to the Appendix contained herein are cited as "Cert. App. ___." Citations to the Eighth Circuit Appendix which are not contained in the Cert. App. are cited as "A___." Citations to the Eighth Circuit Opinion will be "8th Cir. Op."; the Dissent will be "Dissent"; and the panel majority will be "Panel Majority." Citations to the District Court Opinion are cited as "Dist. Ct. Opinion."

Inc.; and another corporation different from appellee/cross-appellant United Parcel Service, Inc. also known as United Parcel Service, Inc.

3. No other publicly held company holds 10% or more of the stock of either appellee/cross-appellant.

(Taken from Respondent's Corporate Disclosure Statement to the Eighth Circuit)

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OPINIONS BELOW

The August 30, 2004 decision of the panel of the United States Court of Appeals for the Eighth Circuit is reported at 380 F.3d 459 (8th Cir. 2004), and is reprinted at Cert. App. 1a-31a. On November 23, 2004 the Eighth Circuit denied Petitioner's Petition for Rehearing *En Banc*; three judges voted to rehear the case. (Cert. App. 84a) The judgment of the district court of May 10, 2002 is reprinted at Cert. App. 58a. The June 26, 2000 summary judgment ruling of the United States District Court for the Eastern District of Missouri reported at 143 F.Supp.2d 1143 (E.D. Mo. 2000) is reprinted at Cert. App. 32a-57a. The class certification order of the district court of October 30, 1996 was published at 169 F.R.D. 349 (E.D. Mo. 1996) and is reprinted at Cert. App. 64a-80a. The district court modified its certification on April 25, 1997. (Cert. App. 59a-63a)

STATEMENT OF JURISDICTION

The Eighth Circuit issued its denial of *en banc* review on November 23, 2004. This Petition for *Writ of Certiorari* is timely in that Petitioners have filed it within 90 days of November 23, 2004. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII, 42 U.S.C. §2000e et seq., specifically §2000e-2(a):

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . or

(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . .

* * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job related

for the position in question and consistent with business necessity;

* * *

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

and 42 U.S.C. §1981:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and

termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

Procedural Background

The Class Representatives for a class of 500 black Center Managers are or were managers for UPS in the Missouri District. They claim on behalf of the class that black management employees are not promoted as quickly or as far as similarly situated white employees. They also allege that UPS pays black Center Managers less than white Center Managers. (Cert. App. 65a, 66a, 68a)

The class appealed the district court's denial to the class of summary judgment on unequal pay as well as the district court's grant of summary judgment to UPS on the class claims. On August 30, 2004, a panel of the Eighth Circuit Court of Appeals affirmed the district court decision over a strong dissent with respect to the class pay claims. Rehearing was denied.

Facts regarding UPS's Corporate Structure

UPS delivers packages world-wide for individuals and businesses. UPS is divided into eleven geographical regions in the United States, each with a Region Manager. A region is subdivided into approximately six districts, each with a District Manager. The District Managers are responsible for

nearly every aspect of district operations, including picking up, sorting, and delivering packages, as well as employee development, promotion, and compensation. There are between sixty and seventy districts in the United States. A district is further divided into divisions. The entry level managerial position is Supervisor who reports to the Center Manager. The Center Manager reports to the Division Manager, the Division Manager reports to the District Manager, and the District Manager reports to the Region Manager. (8th Cir. Op. at Cert. App. 5a-6a)

Facts regarding Center Manager Compensation

The District Manager subjectively determines the specific starting salary of Center Managers within the range UPS assigns. (A661, 1807, 1455-1456) Performance as Supervisor plays no part in establishing Center Managers' initial salary. (A1364) Prior to 1992 UPS had no written guidelines for setting Center Manager pay. (A1354, 1356, 1772, 503-508)

In every year from 1991 through 1997 UPS paid black Center Managers less than white Center Managers. (A458, 474, 490, 500) Experts for both parties found the differences in average base pay between white and black Center Managers to be statistically significant in each year from 1991 through 1994 and in 1996 and 1997. (8th Cir. Op. at Cert. App. 17a, 30a, 31a. *See also* Cert. App. 85a-88a; A458-461, 474, 521, 490, 500, 1805-1806)

Facts regarding Promotion Discrimination Relevant to the Class Promotion Claims

UPS has a policy of promotion from within. (8th Cir. Op. at Cert. App. 6a; Dist. Ct. Opinion at Cert. App. 38a) UPS selects employees from the hourly workforce to enter management at the Supervisor level. (A662-663, 1807) UPS provides full-time Supervisors and Center Managers training, experience, rotations, work assignments, community assignments and exposure the company deems necessary to advance along the management continuum. The experience UPS prefers for Division Managers can be gained as a Supervisor or as a Center Manager. (Cert. App. 108a-109a. *See also* A699, 1826, 1341-1342, 1464, 1533-1534, 1521, 1529) There is no length of time full-time Supervisors must be in management to move to Center Manager and no length of time Center Managers must spend in management before moving to Division Manager. (A668)

UPS does not post management openings. (8th Cir. Op. at Cert. App. 6a; Dist. Ct. Opinion at Cert. App. 38a) There are no objective requirements for moving from Supervisor to Division Manager. (A1049, 1538-1539, 2008)

UPS's "Career Development Planning Guide" defines UPS's subjective career development program. (A1409) UPS's career development system vests its predominantly white upper management across the country with unfettered discretion to make decisions about staffing: creating and filling openings; making regular and special assignments; assigning position levels to jobs; determining type and timing of training

experiences; and making interpretations of and administering UPS's evaluation system. District Managers determine the number of opportunities and timing for movement of management personnel to division level. (*See* A1521, 1433-1434, 1484, 208-217, 1997-2008. *See also* Cert. App. 6a and 38a, and 97a-98a, showing upper level [76-95] always less than 7% black)

The percentage of black division-level employees, compared to the percentage of all black *officials and managers*, *operatives and laborers*, *blue collar workers*, and *total UPS workforce*, show standard deviations ranging from 3.5 to 15.4. (Dist. Ct. Opinion at Cert. App. 43a) UPS uses its total workforce when it tests for disparate impact. (Cert. App. 89a, 106a-107a) UPS management at the highest level identified its total workforce as the pool from which it draws division level managers. (Cert. App. 89a, 113a; A1848-1853, 1561, 1565-1567)

During the liability period there were no fewer than 45 Districts in which UPS promoted no black employees to division level. (Dist. Ct. Opinion at Cert. App. 42a)

It takes black management employees who reach Center Manager level significantly longer to be promoted from their first full-time Supervisor position to Center Manager level and significantly longer to move from Supervisor to Division Manager level than it takes white managerial employees. (Dist. Ct. Opinion at Cert. App. 45a. *See also* Cert. App. 96a)

UPS filled more than 800 Division Manager level openings after June 17, 1989 with white employees.

(A2072-2075) There were black Center Managers in sufficient numbers and with the experience UPS says it prefers for Division Manager level to correct the underrepresentation of blacks in and above Division Manager positions. (A705, 1833, 1067-1106)

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION CONTRARY TO *BAZEMORE* AND *NATIONAL RAILROAD*

In rejecting the Supreme Court's teaching on proof of pay discrimination in *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 111-112 (2002), and thereby denying a favorable judgment to a class of 500 black managers paid discriminatorily less than similarly situated white Center Managers, the Eighth Circuit Court of Appeals has decided an important federal question in a way that conflicts with controlling decisions of this Court. Supreme Court Rule 10(c).

This Court in *Bazemore* held that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . . ." *Bazemore*, 478 U.S. at 395. On June 10, 2002, this Court confirmed its holding in *Bazemore*:

> . . . in *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (*per curiam*), a pattern-or-practice case, when

> considering a discriminatory salary structure, the Court noted that although the salary discrimination began prior to the date that the act was actionable under Title VII, "[e]ach week's paycheck that deliver[ed] less to a black than to a similarly situated white is a wrong actionable under Title VII . . . ."

National Railroad, 536 U.S. at 111-112.

Plaintiffs relied on UPS's expert's report and the controlling law in *Bazemore* to establish UPS's liability on pay. Plaintiffs made their *prima facie* case of *current* pay discrimination by showing UPS paid black Center Managers statistically significantly less than white Center Managers.[2] The Eighth Circuit panel majority concedes that "**UPS expert Dr. Evans' preferred method found statistically significant pay differentials in each year except 1995** [1991-1994 and 1996 and 1997] . . . ." (Panel Majority at Cert. App. 17a) [Emphasis supplied]

Unaccountably the Eighth Circuit majority did not credit the Plaintiffs' initial showing of significant, current pay discrimination. Judge Melloy in his dissent says:

> This is a case in which all the experts, **Defendant's expert** included, **found a statistically significant difference**

---

[2] The standard deviations range from nearly 9 in 1993 to more than 2 in 1997. (Cert. App. 95a)

> between pay of white Center Manager[s] and black Center Managers at UPS in all years at issue except 1995 . . . .
>
> Both parties presented admissible evidence on the issue of pay disparity. All three experts used multiple regression analyses to determine whether the difference in pay was attributable to factors other than race. Each expert identified the factors he or she found to be relevant in determining pay and controlled for these factors in their analysis. Many of the same factors were included in the different studies, such as pay region, performance evaluations, and tenure.

(Dissent at Cert. App. 30a. *See also* Cert. App. 103a) [Emphasis supplied]

The district court departed from the recognized legal analysis of *Bazemore* and denied judgment to the class without so much as mentioning *Bazemore*. The Eighth Circuit panel majority implicitly held that past pay differences between blacks and whites could be a defense against unequal pay, while *Bazemore* teaches just the opposite.[3] (Panel Majority at Cert. App. 20a-26a) Judge Melloy in his dissent noted:

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[3] The panel majority relied on their mistaken assumption that "base pay" was the pay granted a Center Manager upon promotion. (*See* Cert. App. 21a) In reality base pay as used by UPS and by all of the experts is the Center Manager's annual salary without stock award and bonus. UPS admitted Supervisor pay does not affect Center Manager pay. (A1364)

> None of the experts included past pay as a factor in their analysis. However, the majority focuses on this **would-be factor** and upholds summary judgment for the Defendants based on the Plaintiffs' omission of past pay. **They do so despite the fact that all three qualified experts chose not to include past pay as a factor.** They do so while acknowledging that "it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case." Bazemore v. Friday, 478 U.S. 385, 400 (1986).

(Dissent at Cert. App. 31a) [Emphasis supplied]

The Eighth Circuit asserted a "defense" for UPS. UPS did not proffer such a defense or provide any such data. UPS has in fact conceded it does not use past pay in determining current pay. (Cert. App. 111a, 119a; A1364) *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974) held that once a plaintiff establishes a *prima facie* case of pay discrimination "the burden shifts to the employer to show that the differential is justified under one of the Act's . . . exceptions" by **proving** the different pay "is made pursuant to . . . a differential based on any . . . factor other than [race]." [Emphasis supplied]

> The burden is on the opposing party to clearly rebut statistical evidence; hypotheses or conjecture will not suffice. When a plaintiff submits accurate statistical data, and a defendant alleges

> that relevant variables are excluded, defendant may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant, in his rebuttal presentation, must either rework plaintiff's statistics incorporating the omitted factors or present other **proof** undermining plaintiff's claims.

Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 730 (8th Cir. 1982). [Emphasis supplied] *See also Bazemore*; *Corning*. Judge Melloy has pointed out that the court may not conjecture on the moving party's behalf. (Dissent at Cert. App. 31a) The multiple regression studies of both parties turned up no nondiscriminatory factors which justified unequal pay.

UPS did not prove that the pay differences found by all of the experts were on account of any permissible factor and thereby failed to rebut Plaintiffs' pay case. *Coble*, 682 F.2d at 730-31; *Corning*, 417 U.S. at 196-97. Plaintiffs are entitled to summary judgment on pay for every year but 1995 since all of the experts found a statistically significant difference in the pay of black and white Center Managers in each of those years.

II. THE EIGHTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING PROMOTION DISCRIMINATION IN A WAY THAT CONFLICTS WITH *WATSON*

In rejecting the Supreme Court's ruling on relevant statistical analysis in promotion discrimination cases, *Watson v. Fort Worth Bank and Trust*, 487 U.S. 989 (1988), and thereby denying 500 black managers judgment where the undisputed statistical proof conformed to unchallenged authority in *Emanuel v. Marsh*, 897 F.2d 1435 (8th Cir. 1990) and *Paxton v. Union Nat'l Bank*, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983), the Eighth Circuit decided an important question of federal law in a way that conflicts with the controlling decision of this Court. Supreme Court Rule 10(c).

The district court disregarded Eighth Circuit and Supreme Court authority, distorted Plaintiffs' claims, and impermissibly relied on a comparison workpool tainted by discrimination. The panel repeated the district court error.

The panel's ruling defies the statistical standards enunciated clearly in *Emanuel* and *Paxton* to be applied to UPS's multi-level promotion-from-within system, with totally subjective decisions by predominately white upper management as the backdrop. The panel decision also contravenes Supreme Court authority in *Watson*.

The district court found those features of UPS's managerial advancement system which are crucial to proof of the Plaintiffs' case. The district court found that:

- UPS's policy of promotion from within vests authority in District Managers to promote employees to managerial positions at the level of Division Manager and below (Dist. Ct. Opinion at Cert. App. 38a);

- open positions are not posted (Dist. Ct. Opinion at Cert. App. 38a. *See also* Dist. Ct. Opinion at Cert. App. 44a);

- UPS's promotional decision making process is subjective (Dist. Ct. Opinion at Cert. App. 35a, 38a, 44a); and

- color photographs are sometimes displayed during discussions of readiness for promotion. (Dist. Ct. Opinion at Cert. App. 38a)

The district court also noted without analysis of its legal significance the discriminatory result of UPS's promotion system: Blacks are underrepresented at the Division Manager level, and it takes those blacks who do reach Division Manager level longer than whites to move from Supervisor to Division Manager:

- the class submitted charts ". . . *showing* the percentage of black division-level employees, compared to

> the percentage of all black 'officials and managers,' 'operatives and laborers,' 'blue collar workers,' and 'total UPS workforce,' . . . [with] standard deviations . . . ranging from 3.5 to 15.4." (Dist. Ct. Opinion at Cert. App. 43a) [Emphasis supplied]; and

- "[t]he conclusion Dr. Weiner, [Plaintiffs' expert], reached based on a cohort analysis is that it takes black [management] employees [who reached the Center Manager level] significantly longer to be promoted from their first full-time Supervisor position to Center Manager level and from Supervisor to Division Manager level than it takes similarly situated white employees." (Dist. Ct. Opinion at Cert. App. 45a)

UPS did not rebut the underrepresentation of blacks at the Division Manager level or the fact that it takes black management employees who do reach Division Manager level longer than whites to become Division Manager.

Legal standards for analyzing a multi-step promotion system are clear and unchallenged. First, this Court has repeatedly taught that statistical analysis must be relevant, *Watson*. Second, the proper workpool comparisons for a promotion ladder case are laid out in *Emanuel* and *Paxton*.

Disparate Impact Analysis

The class made a *prima facie* case of denial of equal promotional opportunity under the disparate impact model. UPS did not rebut the class's *prima facie* disparate impact case. The Eighth Circuit panel declined to analyze Plaintiffs' disparate impact showing notwithstanding this Court's direction in *Watson*. (*See* Panel Majority fn. 2 at Cert. App. 27a-28a)

As recognized by the Eighth Circuit in *Emanuel*, the Supreme Court concluded in *Watson* that subjective decisionmaking may violate Title VII. The class proved disparate impact by applying to UPS's subjective career development process the multi-prong disparate impact analysis exactly as set out in *Emanuel*, 897 F.2d at 1439:

(1) The UPS black managers belong to a protected group.

(2) UPS's subjective career development process does not provide job posting or "application process" and does not include objective criteria for moving to and beyond the division level. (*See* Dist. Ct. Opinion at Cert. App. 38a, 44a; A674, 684, 1813, 1821, 1696)

(3) UPS filled more than 800 Division Manager level openings after June 17, 1989 with white management employees. (A2072-2075) UPS admitted that there were blacks in sufficient numbers to move to Division Manager level to correct the underrepresentation of blacks at and above Division Manager positions. (A705, 1833, 1067-1106)

(4) The district court found the class showed standard deviations "ranging from 3.5 to 15.4" comparing representation of blacks at Division Manager level to the expected percentage of blacks from the appropriate internal pools. (Dist. Ct. Opinion at Cert. App. 43a) For the operatives and laborers pool, the pool like that of *Emanuel*, the class's unrebutted calculation shows 11.0 to 15.4 standard deviations. (Cert. App. 99a-100a. *See also* A1161-1164, 1166-1168)[4] The statistical disparities shown create an inference of *racial imbalance* in UPS's workforce. *Watson*, 487 U.S. at 993; *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 (1977).

(5) UPS rebutted none of Plaintiffs' statistics. *Watson*, 487 U.S. at 994-98.

(6) The class identified the specific employment practice it challenges as discriminatory. *Watson*, 487 U.S. at 993. The district court acknowledged that the class identified UPS's practice of "subjective selection procedures." (Dist. Ct. Opinion at Cert. App. 35a)

(7) The class proved that UPS's subjective career development system and its subjective selection procedures caused the underrepresentation: the large

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[4] As in *Emanuel* Plaintiffs offered three other statistical comparisons likewise indicating underrepresentations: blue collar workers--class's unrebutted calculation shows 10.6 to 15.0 standard deviations; total UPS workforce--class's unrebutted calculation shows 10.1 to 13.6 standard deviations; and officials and managers--class's unrebutted calculation shows 3.5 to 5.5 standard deviations. (Cert. App. 98a-99a, 100a-102a)

standard deviations raise an inference of causation. *Emanuel*, 897 F.2d at 1441-42; *Watson*, 487 U.S. at 995.

(8) Causation having been established, UPS must demonstrate a business justification for its employment practice. *Watson*, 487 U.S. at 997-98. UPS made no effort to defend its subjective secretive career development system.

UPS's failure mandates judgment for the class on its disparate impact claim.

Disparate Treatment Analysis

The class also made a *prima facie* case of denial of equal promotion to black managers to and above Division Manager under the disparate treatment model. UPS did not rebut the class's *prima facie* disparate treatment case.

Under a disparate treatment pattern and practice analysis, proof of gross disparity between the representation of blacks in division level positions compared to their representation in lower level positions raises an inference of discrimination. *Paxton*, 688 F.2d at 564; *Castaneda*, 430 U.S. at 496 n. 17.

The Eighth Circuit in *Paxton*, holding that the bank discriminated against its black employees, found: the bank promoted from within; vacancies were not posted; the criteria for promotions were primarily subjective in nature; white Supervisors made most of the promotional decisions; and adherence to the affirmative action policy was not required by top

management . . . . *Paxton*, 688 F.2d at 564-65. In this case, as in *Paxton*:

> (1) UPS promotes from within (8th Cir. Op. at Cert. App. 6a; Dist. Ct. Opinion at Cert. App. 38a);
>
> (2) vacancies are not posted (*Id.*);
>
> (3) criteria for promotion are subjective and ever changing (A208-217. *See also* Dist. Ct. Opinion at Cert. App. 38a);
>
> (4) predominantly white District Managers with unfettered discretion make the promotional decisions (Dist. Ct. Opinion at Cert. App. 38a; Cert. App. 93a; A1252-1253, 1484, 1699-1700, 989-990); and
>
> (5) adherence to UPS's stated policy of valuing diversity is belied by its gross underrepresentation of blacks at and above the Division Manager level. (Cert. App. 98a-102a; A1252-1253)

A *prima facie* case of disparate treatment may be established by statistics alone if they are sufficiently compelling. *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465 (8th Cir. 1984). Standard deviations of 3.5-15.4 are astonishing and unrebutted and prove discrimination. (Dist. Ct. Opinion at Cert. App. 43a. *See also* Cert. App. 98a-102a; A954-982, 2064, 2071) *See also Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 662 (5th Cir. 1983).

UPS did not offer a defense. UPS's CEO during the liability period recognized that blacks are underrepresented in upper level management and that UPS's subjective selection process is not working for blacks. (Cert. App. 110a-117a)

Proper Pool versus Tainted Pool

Both the district court and the Eighth Circuit confuse the class with the proper pool. Until summary judgment, the district court consistently defined the classes to reflect Plaintiffs' promotion claim: the district court's class definition and clarification reflect the complaint of the Center Manager class of retarded movement from *Supervisor* positions to *Division Manager* positions and *beyond*. (*See* A77-79; Cert. App. 59a-63a, 81a-82a. *See also* Cert. App. 65a, 68a; 8th Cir. Op. at Cert. App. 7a-8a)

In its June 26, 2000 Memorandum and Order the district court arbitrarily changed Plaintiffs' systemic mobility claim--that blacks who reach the level of Center Manager do not move from *full-time Supervisor* **to** and **beyond** *Division Manager* as fast as whites, and do not move as far as whites--to a claim of denial of promotion from Center Manager to Division Manager--a one-step claim Plaintiffs never made. (Dist. Ct. Opinion at Cert. App. 45a. *See also* 8th Cir. Op. at Cert. App. 12a-13a) In *Emanuel* the Eighth Circuit used lower level workforce and other basic workforce subsets as comparison pools to show discrimination up the entire promotion ladder. 897 F.2d at 1440-41.

Plaintiffs showed gross underrepresentation of blacks at the Center Manager level with standard

deviations ranging from 4.5-18.4 (Cert. App. 123a-138a) thereby showing a Center Manager pool fatally tainted by bottom to top discrimination. The discriminatory restricted number of black Center Managers cannot be manipulated to conceal discrimination at higher levels. The district court and the panel refer to Center Managers as the only employees "qualified" for promotion. (*See* Dist. Ct. Opinion at Cert. App. 43a-45a; 8th Cir. Op. at Cert. App. 12a-14a) UPS has admitted however that any preferred experience can be gained at either the Supervisor level or the Center Manager level. (A668, 699, 1826, 1341-1342, 1464, 1533-1534, 1521, 1529, 1809)

The district court effectively acknowledged the gross disparity between the percentage of blacks in division level positions and the percentage of blacks in each of four appropriate UPS internal pools:[5] the district court admitted into evidence and acknowledged the standard deviations ranging from 3.5 to 15.4. (Dist. Ct. Opinion at Cert. App. 43a) The panel does not recognize or acknowledge the magnitude of the standard deviations or the fact that they are unrebutted. (8th Cir. Op. at Cert. App. 12a-13a) The gross disparity establishes a *prima facie* case of race discrimination under Supreme Court and Eighth Circuit law.

The district court found that Plaintiffs also proved their retarded movement within management to and above Division Manager. Dr. Weiner's conclusion

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[5] Officials and managers, operatives and laborers, blue collar, and total workforce. (Cert. App. 96a-102a)

that white Center Managers moved faster than Plaintiffs from Supervisor to both Center Manager and Division Manager is unrebutted. (Dist. Ct. Opinion at Cert. App. 45a) The panel mislabels this unrebutted evidence as a "suggestion." (8th Cir. Op. at Cert. App. 13a)

III. THE EIGHTH CIRCUIT DEPARTED FROM THE SUPREME COURT'S MANDATE AGAINST A COURT'S WEIGHING OF EVIDENCE

The Eighth Circuit Court of Appeals admitted it weighed evidence in defiance of the Supreme Court's mandate in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and upheld an improper determination on summary judgment which dismissed the claims of 500 black managers: the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings at summary judgment so as to call for an exercise of the Supreme Court's supervisory power. Supreme Court Rule 10(a).

In complete disregard for the law in summary judgment proceedings, the Eighth Circuit panel majority acknowledged that they weighed the evidence, stating a court ". . . can use the scale to a limited degree . . . ." (Panel Majority at Cert. App. 20a. *See also* Panel Majority at Cert. App. 21a-22a, 24a-25a, n.6 at 28a)

Judge Melloy in his dissent correctly noted:

> At the summary judgment stage, "[c]redibility determinations, **the weighing of the evidence**, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

(Dissent at Cert. App. 31a) [Emphasis supplied] *See also Reeves.*

After making the astonishing statement that courts may weigh the evidence, the Eighth Circuit majority cited to *Bazemore*. *Bazemore* went to trial, the judge was the trier of fact and weighed the evidence.

Although Judge Melloy noted in his dissent only the court's weighing of pay evidence, the Eighth Circuit weighed the evidence, made credibility determinations, drew inferences in UPS's favor, and actually found non-existent facts in both the class pay and promotion cases. (Cert. App. 11a-14a, 16a-26a)

CONCLUSION

This Petition for *Writ of Certiorari* should be granted to correct the unwarranted summary dismissal of the valid and substantial claims of 500 black Center Managers who were victims of systemic race

discrimination practiced by UPS. The Eighth Circuit panel majority's decision on pay conflicts with the holding of this Court in *Bazemore*. The Eighth Circuit opinion on promotion conflicts with this Court's holding in *Watson*. Finally this Court should exercise its supervisory powers with respect to weighing evidence in summary judgment proceedings.

Respectfully submitted,

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(Any footnotes trail end of each document)

Nos. 02-2545/02-2835

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Leslie Morgan; Kenneth Stacker; Theodore Boldin, Class Representatives of the Plaintiff Class, Plaintiffs/Appellants/ Cross-Appellees,

Enoch Love; Equal Employment Opportunity Commission, Intervenor Plaintiffs,

v.

United Parcel Service of America, Inc.; United Parcel Service, Defendants/Appellees/Cross-Appellants.

Charles Cartwright, Movant/ Appellant, Brian Needham, Movant, Bedell Finley; Frank Jackson, Movants/ Appellants, Francis Truitt, Movant.

April 14, 2003, Submitted
August 30, 2004, Filed

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JUDGES: Before MORRIS SHEPPARD ARNOLD, BEAM, and MELLOY, Circuit Judges. MELLOY,

Circuit Judge, concurring and dissenting.

OPINION BY: BEAM

OPINION: BEAM, Circuit Judge.

Leslie Morgan; Kenneth Stacker, and Theodore Boldin, black managers at United Parcel Service (UPS), brought a civil rights action alleging individual and class claims of employment discrimination under Title VII and 42 U.S.C. § 1981. These individuals moved for class certification and the district court partially granted the motion, certifying four classes of employees (collectively, "Plaintiffs"). UPS moved for summary judgment on both the Title VII and the 42 U.S.C. § 1981 class claims or to decertify the class. Plaintiffs moved for partial summary judgment on their class claims of racially discriminatory pay. The district court denied Plaintiffs' motion, granted summary judgment to UPS, and denied UPS's motion to decertify the class. It held that Plaintiffs had failed to adduce sufficient evidence of a pattern or practice of class-wide discrimination. We affirm.

FACTUAL BACKGROUND

UPS delivers packages world-wide for individuals and businesses. UPS is divided into eleven geographic regions in the United States, each with a regional manager. A region is subdivided into approximately six districts, each with a district manager. The district managers are responsible for nearly every aspect of district operations, including picking up, sorting, and delivering packages, as well as employee development, promotion, and compensation. There are between sixty

and seventy districts in the United States and each one varies in geographic size, population density, package volume, and labor climate. A district is further divided into divisions, each with a division manager. Divisions are organized along functional lines with some related to package operations and some related to supporting staff.

Two levels of managerial employees exist below the division level: supervisors and center managers. The entry level managerial position is a supervisor who reports to the center manager. The center manager reports to the division manager, the division manager to the district manager, and the district manager to the regional manager.

UPS vests decisionmaking authority in district managers to promote employees to division manager, center manager, and supervisor. District managers hold "People's Meetings" approximately twice a year, where they discuss the upward mobility of management personnel. At these meetings, information is presented on supervisors and center managers in the district and their performance and readiness for promotion are assessed. At some of the meetings, a color photograph of the individual is displayed. The meeting produces a list of the employees who the district managers believe are ready for promotion to managerial positions. Open positions within the company are not posted. The district manager may consult the list compiled at the meetings to determine who will receive a promotion.

PROCEDURAL BACKGROUND

Plaintiffs are all UPS center managers and they allege that UPS racially discriminated against them in terms of upward mobility, working conditions, and pay. With regard to the upward-mobility claim, Plaintiffs argue that the subjective selection process for managerial positions at UPS limits the promotion of blacks, which, in turn, inhibits their overall upward mobility and causes them to peak in their careers at or below the center-manager level.

The district court bifurcated the trial into a liability/injunctive phase, followed by a remedial/damages phase. Four classes were certified under Federal Rule of Civil Procedure 23(b)(2) for the first phase. The court said it would consider certifying the damages phase as a Rule 23(b)(3) class action if liability was established. The Title VII denial-of-upward-mobility class was defined as:

All black salaried full-time employees of UPS nationwide employed as center managers in Operations (Package, Hub, Feeder, Air) or Human Resources at any time between December 20, 1991 and the date of judgment, and who worked as a supervisory or managerial employee of UPS for at least five years without being promoted above the center manager level.

The Title VII unequal-working-conditions and unequal-pay class was defined as:

All black salaried full-time employees of UPS nationwide employed as center managers in Operations

(Package, Hub, Feeder, Air) or Human Resources at any time between December 20, 1991 and the date of judgment.

The 42 U.S.C. § 1981 denial-of-upward-mobility class was defined as:

All black salaried full-time employees of UPS nationwide employed as center managers in Operations (Package, Hub, Feeder, Air) or Human Resources at any time on or after June 17, 1989 and the date of judgment, and who worked as a supervisory or managerial employee of UPS for at least eight years without being promoted above the center manager level.

The 42 U.S.C. § 1981 unequal-working-conditions and unequal-pay class was defined as:

All black salaried full-time employees of UPS nationwide employed as center managers in Operations (Package, Hub, Feeder, Air) or Human Resources at any time on or after November 21, 1991 and the date of the judgment.

The district court granted a motion by the EEOC to intervene, but the EEOC is not involved in these appeals. At the time of the original class certification, Charles Cartwright was a member of at least two certified classes. After modification of the certified classes, the district court ruled that he no longer qualified as a member of any of the four classes and thus vacated the order allowing him to intervene. Frank Jackson was also denied intervenor status. Both Cartwright and Jackson appeal those decisions. Brian

Needham, Francis Truitt, and Bedell Finley also sought, but were denied, intervenor status; however, they are not parties to this appeal. n1

Discovery proceedings produced reports, statistical analyses, and models of UPS's employment data and practices prepared by experts for all parties. Plaintiffs presented two experts who conducted statistical analyses: Dr. Weiner and Dr. Stapleton. And the Defendant offered statistical analyses conducted by its expert, Dr. Evans. At the close of discovery, UPS moved for summary judgment on all class claims or to decertify the classes. Plaintiffs moved for partial summary judgment on their class claim of discriminatory pay. UPS also moved to bar the testimony of two of Plaintiffs' experts as inadmissible under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), because of faulty methodology and data. The district court granted UPS summary judgment on all class claims and denied Plaintiffs' summary judgment motion. The court also denied as moot UPS's motions to decertify the class and to bar Plaintiffs' expert testimony.

III. DISCUSSION

Plaintiffs claim the district court erred in granting UPS's summary judgment motion on each of the three class claims: (1) denial of overall upward mobility, (2) working conditions, and (3) pay.

We review de novo a grant of summary judgment to determine whether a claim is factually supported. Jackson v. Ark. Dep't of Educ., 272 F.3d 1020, 1025 (8th

Cir. 2001). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must view all facts in the light most favorable to the nonmoving party and give the nonmoving party the benefit of all reasonable inferences that can be drawn from those facts. Widoe v. Dist. # 111 Otoe County Sch., 147 F.3d 726, 728 (8th Cir. 1998). However, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Therefore, in a motion for summary judgment, "the judge's inquiry unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." Id.

Plaintiffs' case centers on discriminatory treatment in the form of unequal working conditions, promotions, and pay. More specifically, this class action alleges a pattern or practice of discrimination with regard to each of these three aspects of employment. In a pattern-or-practice class action, the class must prove that the defendant "'regularly and purposefully' treated members of the protected group less favorably and that unlawful discrimination was the employer's 'regular procedure or policy.'" EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 951 (8th Cir. 1999) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335, 360, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977)). Stated

differently, the class must prove that the "'discrimination was the company's standard operating procedure-the regular rather than the unusual practice.'" Craik v. Minn. State Univ. Bd., 731 F.2d 465, 470 (8th Cir. 1984) (quoting Teamsters, 431 U.S. at 336). Upon an employer's summary judgment motion, the plaintiff class must adduce some evidence from which this conclusion can be drawn. Proving discrimination that is "'isolated or sporadic'" is insufficient. McDonnell Douglas, 191 F.3d at 951 (quoting Cooper v. Federal Reserve Bank, 467 U.S. 867, 876, 81 L. Ed. 2d 718, 104 S. Ct. 2794 (1984)).

Typically in a case like this one, plaintiffs will offer statistical evidence of disparities between protected and unprotected employees who are otherwise similarly situated. Craik, 731 F.2d at 470. In defense, employers attempt to show that the plaintiffs' "'proof is either inaccurate or insignificant.'" Id. (quoting Teamsters, 431 U.S. at 360). To be legally sufficient, the plaintiffs' statistical evidence "must show a disparity of treatment, eliminate the most common nondiscriminatory explanations of the disparity, and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination." Hervey v. Little Rock, 787 F.2d 1223, 1228 (8th Cir. 1986) (quotation omitted). The bottom-line question in this case is whether Plaintiffs produced more than a scintilla of evidence showing UPS engaged in a pattern or practice of discrimination with regard to the class members. The typical McDonnell-Douglas burden-shifting framework, while not irrelevant, is not tremendously helpful in this context. Craik, 731 F.2d at 470-71 & n.7.

Upward Mobility

Plaintiffs argue that the district court erred in granting summary judgment to UPS on the denial-of-upward-mobility claims. Plaintiffs contend they proved discrimination in upward mobility under both disparate-impact and disparate-treatment models. Like the district court, we conclude Plaintiffs have failed to establish a prima facie case because their evidence of racial disparities was insufficient, giving rise to no inference of discrimination.

Initially, Plaintiffs offered a Wilcoxon test performed by Dr. Weiner. Plaintiffs argue this test showed that it took longer for black center managers to be promoted to their first division-level job than it did for white center managers. However, UPS's experts pointed out, and Dr. Weiner admitted, that she did not perform the correct Wilcoxon test. When Dr. Weiner used the correct test, she determined that there was no racial disparity in the pattern of these promotions.

Next, Plaintiffs offered evidence that in thirty-five of UPS's districts, there were no blacks promoted to division manager between 1989 and 1998. The district court pointed out two problems with this analysis. First, this tally did not take into account whether there were any qualified black employees available for promotion in those districts. UPS's expert, Dr. Evans, performed an analysis taking the availability of qualified black employees into account and determined that the number of districts in which no blacks were promoted was actually lower than would be expected. Second, even a successful showing of discrimination in some districts does not prove nationwide

discrimination. In fact, as the district court pointed out, proof of discrimination in some districts and not others tends to defeat the argument that discrimination was UPS's nationwide standard operating procedure.

In addition, Plaintiffs presented charts comparing the representation of blacks at the division-manager level to the percentage of all black officials and managers, operatives and laborers, blue collar workers, and the total UPS workforce. The district court properly found that a racial disparity amongst these populations would not give rise to an inference of discrimination. "The 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.'" Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989) (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977)) (alterations in original). "Statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988). The upward-mobility classes consist of center managers who have not been promoted to division manager. Thus, the probative inquiry involves a comparison between the percentage of division managers who are black and the percentage of qualified employees who are black in the population from which division managers are chosen. As the district court held, "plaintiff's reliance on a bottom line racial imbalance in the workforce is insufficient to establish that blacks are less likely to be promoted." Morgan v. UPS, 143 F. Supp. 2d 1143, Mem. & Order at 12 (E.D. Mo. 2000).

Finally, Dr. Weiner presented a cohort analysis suggesting it takes black employees significantly longer to be promoted from their first full-time supervisor position to division manager than it takes similarly situated white employees. However, Dr. Weiner admitted that the data she looked at "is not appropriate for examining the time to promotion from center manager to division level manager," 143 F. Supp. 2d at 1150, and center managers are the class of employees at issue. UPS's expert, Dr. Evans, performed an analysis on the correct set of promotions and concluded that it actually takes whites longer than blacks to get promoted from center manager to division manager.

Plaintiffs' proof is insufficient under both the disparate-treatment and disparate-impact models. To avoid summary judgment under the disparate-treatment model through the use of statistics, Plaintiffs must show that "when the proper labor market is considered, the statistical evidence is sufficient to raise an inference of discrimination." Paxton v. Union Nat'l Bank, 688 F.2d 552, 564 (8th Cir. 1982). As discussed above, Dr. Weiner's correct Wilcoxon test showed no racial disparity, and her other analyses do not take into account the proper labor market--available qualified employees. Thus, the claim fails under the disparate-treatment model.

And, to the extent Plaintiffs raise a disparate-impact claim, n2 they have failed to "show relevant statistical disparities permitting an inference of racial imbalance in defendant's workforce." Emanuel v. Marsh, 897 F.2d 1435, 1439 (8th Cir. 1990). The relevant inquiry was whether promotions from center to division manager were racially discriminatory, taking into account the

proper pool of available qualified employees. The evidence presented of overall racial imbalances and even more general trends in upward mobility is insufficient. Plaintiffs did not adduce sufficient evidence to avoid summary judgment.

Working Conditions

The district court ruled that Plaintiffs presented insufficient evidence to prove a class-based claim of unequal working conditions. Plaintiffs argue that the district court erred because (1) UPS did not move for summary judgment on working conditions, and (2) Plaintiffs presented sufficient evidence to survive summary judgment.

UPS's motion for summary judgment was sufficient. UPS moved for summary judgment "on Class Plaintiffs' Amended and Supplemental Complaint," which encompassed claims of unequal working conditions. UPS also specifically mentioned working conditions in its motion and asked the court to strike those class claims as unsupported. Plaintiffs were aware that the working-conditions claim was at issue because in their response to the summary judgment motion they discussed working conditions evidence and cited the record on the issue. We therefore agree with the district court that UPS moved for summary judgment on this claim.

We also agree that Plaintiffs' proof on the working conditions was insufficient to survive summary judgment. While Plaintiffs correctly note that statistical evidence is not required to prove pattern-or-practice discrimination, Catlett v. Mo. Highway &

Transp. Comm'n, 828 F.2d 1260, 1265 (8th Cir. 1987), the anecdotal evidence here is not enough to support their claims. Plaintiffs' evidence consists of statements by individual class members made in response to interrogatories, unsigned by the class members. The district court did not err in finding this evidence insufficient. The grant of summary judgment for UPS on the working-conditions claim is therefore affirmed.

Pay

Plaintiffs argue that UPS was not entitled to summary judgment on the discriminatory pay claim. They contend that they presented sufficient evidence of a pattern or practice of discrimination with regard to pay in the form of two multiple regression analyses. They say that those analyses give rise to a reasonable inference of discrimination because they show UPS paid white center managers more than black center managers after controlling for many legitimate reasons for such a pay disparity.

A multiple regression analysis attempts to reveal relationships between explanatory variables and a dependent variable. Daniel L. Rubinfeld, Reference Guide on Multiple Regression, in Federal Judicial Center, Reference Manual on Scientific Evidence 181 (2d ed. 2000). Explanatory variables are the expected influences on the dependent variable. Id. In this case, pay is the dependent variable. The explanatory variables are what bring race into the picture. In effect, the regression controls for the explanatory variables--those factors that one would expect to influence pay--and then compares the wages of white and black employees. "At best, the regression equation used to

assess discrimination in compensation levels can be viewed as a good representation, based on available information, of what factors seem to be related to compensation levels, on average." Ramona L. Paetzold & Steven L. Willborn, The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases § 6.01, p.3 (2002). Thus, the selection of explanatory variables is quite important. However, even the best regression equation cannot directly show discrimination because it cannot prove causation. The most it can show is a correlation that can give rise to an inference of discrimination. Id. § 2.05; Rubinfeld, ante, at 183-85. Whether such an inference is reasonable is the legal question we address.

All three experts performed regression analyses, and all agreed that this form of statistical analysis was proper. But the experts came to different conclusions because each of them included different explanatory variables. Plaintiffs' first expert, Dr. Weiner, found a statistically significant pay disparity of between $ 1,275 and $ 2,050 per year. She included two years of measured performance, n3 pay region, and time as a supervisor as explanatory variables. Plaintiffs' other expert, Dr. Stapleton, found a statistically significant pay disparity of between $ 562 and $ 852 per year. He included two years of measured performance, geographic district, tenure with UPS, time as a center manager, and whether the employee was currently in Human Resources, Air Operations, or Package Operations.

UPS expert Dr. Evans' preferred method found statistically significant pay differentials in each year except 1995, for which he found no statistically

significant difference in pay. This analysis was achieved using as variables "union tenure, parttime supervisor tenure, full-time supervisor tenure, center manager tenure, an indicator for having previously been a division manager and others for having been in air operations or having been a Package Operations Supervisor, indicators for the various districts, and current and past performance." Dr. Evans concluded that his study demonstrated there was no statistically significant difference in pay between black and white center managers during the class period. He reasoned that 1995 was the only year for which he could do a proper analysis, because it was the only year for which there was sufficient measured performance data. In other years, he said, the analysis incorrectly indicated a disparity because insufficient measured performance data existed. Dr. Evans admitted that when no performance data was included, a statistically significant pay disparity existed.

Because the only evidence that substantiates Plaintiffs' claim is their regression analyses, and because this sort of evidence is subject to Daubert, two issues arise: (1) admissibility and (2) the propriety of summary judgment. If the analyses were not admissible, then summary judgment was appropriate. If the analyses were admissible, summary judgment may or may not be appropriate, depending on whether they create a reasonable inference of a pattern or practice of disparate pay.

It is not clear whether the district court deemed Plaintiffs' regressions inadmissible or concluded that they did not create a genuine issue of fact. The district court found that "the variables are properly included in

Dr. Evans' analysis." Morgan, 143 F. Supp. 2d at 1151. And it concluded, "defendants have shown that any pay disparity between black and white center managers is caused by factors other than race." 143 F. Supp. 2d at 1152.

We defer to admissibility determinations under an abuse-of-discretion standard of review, even at summary judgment. Gen. Elec. & Co. v. Joiner, 522 U.S. 136, 143, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997). The district court did not mention Daubert, but its analysis plainly hinges on problems with Plaintiffs' analyses that are arguably methodological--what explanatory variables are proper. Daubert, 509 U.S. at 592 (stating that admissibility determinations "entail[] a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue"); accord Eckelkamp v. Beste, 315 F.3d 863 (8th Cir. 2002) (applying deferential review to evidentiary determination plainly premised on the methodolgical underpinnings of an expert's opinion). But because the district court denied UPS's motions relating to Daubert and Rule 702 as moot, n4 we are not inclined to accord the trial court's decision that degree of deference. Moreover, the question of what explanatory variables should be included in a particular regression normally "affects the analysis' probativeness, not its admissibility." n5 Bazemore v. Friday, 478 U.S. 385, 400, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986).While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major

factors must be considered unacceptable as evidence of discrimination. It is clear that a regression analysis that includes less than all measuarable variables may serve to prove a plaintiff's case.

Id. at 400 (quotation omitted).

Admissible regressions, however, do not necessarily mean summary judgment is inappropriate. See Daubert, 509 U.S. at 596 ("In the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment . . . ."). While a trial court may not weigh the evidence or consider credibility at summary judgment, Anderson, 477 U.S. at 255, it can use the scale to a limited degree; it must ensure that the nonmoving party has at least a scintilla of evidence in support of its position. In so doing, "the court must draw all reasonable inferences in favor of the nonmoving party." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000); accord Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999).

"Gross statistical disparities . . . alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977). And the usefulness of statistics "depends on all of the surrounding facts and circumstances." Teamsters, 431 U.S. at 340. Here, the regression analyses are all the evidence of discriminatory pay that Plaintiffs have, so those analyses must show a gross

statistical disparity and this must be a proper case--a case in which the gross disparity can give rise to a reasonable inference that paying blacks less because they are black is UPS's standard operating procedure.

A reasonable inference of such discrimination does not arise in this case. First, Plaintiffs' regressions fail to take into account past pay, performance, or both. Second, when evaluated in the context of the undisputed facts, the regressions fail to create a triable case of pattern-or-practice discrimination.

Evaluating the propriety of explanatory variables is a somewhat comparative exercise. When a defendant attacks a plaintiff's regression, he must typically do more than point out the flaws in his opponent's analysis. Instead, the defendant must show that the omission had an impact on the result. See Catlett, 828 F.2d at 1266. n6 But, "there may be a few instances in which the relevance of a factor . . . is so obvious that the defendants, by merely pointing out its omission, can defeat the inference of discrimination created by the plaintiffs' statistics." Palmer v. Shultz, 259 U.S. App. D.C. 246, 815 F.2d 84, 101 (D.C. Cir. 1987).

Selecting proper explanatory variables is a function of the particular employer's compensation determinations. Under UPS's pay scheme, center-manager pay has two components: base pay and salary increases. A center manager's base pay is determined when he a center manager, subject to later salary increases based on performance. An individual's base pay remains constant during his tenure as a center manager. Center-manager base pay is calculated in part by using the individual's prior pay, generally as a supervisor. Supervisor pay has

the same two elements--base pay at the time of promotion and salary increases based on performance during one's tenure as a supervisor. Supervisor base pay is calculated using that individual's prior hourly wage. Individuals in certain operations (e.g., air operations) are paid more as a part of their job; thus, their hourly rate, and supervisor and center-manager base pay are higher. Union membership could have a similar effect.

The discrimination alleged in this claim is that black center managers, between 1991 and the time of judgment, were paid less than similarly situated white center managers because they were black. All experts agree that their regressions revealed no racial disparity in terms of center-manager pay raises for the class period. So in order for the pay of black class members to be lower than that of white center managers, the discrimination had to occur with regard to center-manager base pay. Because the base pay is set according to past pay, variable(s) representing that factor are important.

As UPS points out, both Dr. Weiner and Dr. Stapleton excluded past pay from their regressions. Dr. Stapleton admitted that if past pay was included in the analysis, then no statistically significant disparity between white and black pay existed. n7 Plaintiffs argue that the exclusion was justified under Bazemore v. Friday, 478 U.S. 385, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986). We disagree.

Bazemore's relevance involves the somewhat related questions of what role past pay has in a pay discrimination case and when an explanatory variable is

properly omitted from a regression analysis. Plaintiffs correctly note that Bazemore means that past discriminatory pay cannot be a legitimate excuse for a later pay disparity. 478 U.S. at 394-96. Regression analyses in discrimination cases attempt to control for the legitimate reasons for pay disparities through the use of explanatory variables. But, illegitimate reasons--reasons themselves representative of the unlawful discrimination at issue--should be excluded from the regression (or otherwise dealt with) to avoid underestimating the significance of a disparity. See Paetzold & Willborn, ante § 6.13 (discussing the problem of tainted variables). Thus, a regression could be probative of discrimination without taking into account past pay if that past pay was set according to race. This is because past discriminatory pay makes current pay disparities actionable n8 under Bazemore, and because the variable can be omitted from a regression if tainted by the discrimination at issue.

In Bazemore, both the district court and the court of appeals found that past pay was set according to race. 478 U.S. at 390-91, 394, 401-02. Thus, the salary figures used in the plaintiffs' regression in that case were proper even though past discriminatory pay accounted for some of the later disparity. In other words, Bazemore's regressions did not need to account for past pay because there was evidence of past discrimination. Here, Plaintiffs would be excused from accounting for past pay if they could show past discrimination. We see no such evidence.

Plaintiffs appear to justify the omission of past pay by pointing to the class period disparity that their experts found, inferring discrimination, and claiming that a

reasonable inference is that past pay disparities were also race based. This argument is circular. The correlation between race and center-manager base pay from 1991 on exists only if past pay is omitted from the regression. Past pay can only be omitted if it is somehow linked to race. Plaintiffs' only evidence of discrimination in past pay is the apparent correlation between race and center-manager base pay during the class period. But that correlation is what Plaintiffs have evidence of only by omitting past pay. They have no evidence, statistical or otherwise, that past pay disparities were racially discriminatory. This sort of bootstrapping cannot create an inference of discrimination with regard to either class-period base pay or past pay.

The variables Plaintiffs did use also do not account for the role of past pay. For example, because performance affects past pay, performance variables arguably could be proxies for past pay. n9 Dr. Stapleton appreciated this aspect of the case but refused to include "lagged" performance measures precisely because "it's really just explaining current pay experience by past pay experience." And he offered this past pay rationale as his reason for omitting most other experiential factors that affect pay at UPS. As explained above, this observation could be meaningful if there had been some evidence that past pay experience was tainted by discrimination. There was none here and the assumption that past pay should be omitted, as well as most factors related to it, was unjustified.

There are a variety of other concerns that reduce the import of Plaintiffs' regressions. The performance data, which was included in all experts' regressions to some

extent, poses a problem. Performance data from performance evaluations that UPS conducted existed for 1991, 1992, 1993, 1994, and 1995. n10 Performance was certainly relevant to the employer's pay decisions, but it appears to us that performance could only affect center-manager base pay indirectly--by influencing past supervisor pay through past supervisor salary increases, past hourly rates, or both. So Plaintiffs' regression should have utilized past performance as far back as was available, rather than just the two years they did include.

UPS offered its own regression indicating the omission had an impact. Dr. Evans conducted a regression for 1995, included all available performance data, and concluded that no statistically significant pay disparity remained--i.e., the inclusion of performance eliminated the significance of race. We think this was sufficient to show the adverse impact of omitting available performance data and showed that other performance, even though not measured by evaluations, was important. At the very least, the fact that no correlation existed in 1995 severely damages the inference that UPS had a nationwide standard operating procedure of paying blacks less than whites.

We also have no indication of which employees' performance data was included in the regressions. Given the nature of the claim--that center managers' base pay was lower for blacks than whites--and the fact that center-manager base pay is set only at the time of promotion, performance prior to the time of promotion is all that is relevant. Thus, for class members that were promoted to center managers before 1991, there are no performance evaluations from which to draw

data. And for individuals that were promoted after 1991, until 1995, the only relevant performance data comes from pre-promotion evaluations. Post-promotion performance could simply have no affect on base pay. And such performance seems too attenuated an indicator of pre-promotion performance to be included.

The nature of UPS's management system also makes a claim of nationwide pattern-or-practice discrimination difficult. Pay was set according to a decentralized scheme in which district managers were given the discretion to set pay. With approximately seventy districts in the United States, each with their own manager, the statistical evidence would have to be quite strong to raise, by itself, an inference of nationwide discrimination.

One of the most important flaws in Plaintiffs' case is that they adduced no individual testimony regarding intentional discrimination. As mentioned above, Plaintiffs' purported anecdotal evidence was insufficient for the working-conditions claim, and we see none with regard to pay. Although such evidence is not required, the failure to adduce it "'reinforces the doubt arising from the questions about validity of the statistical evidence.'" EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 311 (7th Cir. 1988) (quoting Griffin v. Board of Regents, 795 F.2d 1281, 1292 (7th Cir. 1986)). Such evidence would bring the "cold numbers convincingly to life." Teamsters, 431 U.S. at 339.

Finally, as explained above, there was no apparent discrimination with regard to pay raises, promotions, or working conditions. Statistical evidence like that adduced here, at best, can only show a correlation

between race and the dependent variable that gives rise to a further inference of pattern-or-practice discrimination in a proper case. Here the flaws are too many and the probative value too slight for Plaintiffs' regressions to carry the day by a preponderance of the evidence in the context of this case. It would be manifestly unreasonable to infer from Plaintiffs' regression analyses that UPS set center managers' base pay lower for blacks as a matter of practice all across the country during the period in question. Accordingly, summary judgment was appropriate.

Remaining Issues

We affirm the two remaining issues on appeal. First, the district court did not err in denying the motions to intervene brought by Frank Jackson and Charles Cartwright. Second, with regard to UPS's cross-appeal, the district court properly denied as moot the motion to decertify the classes.

CONCLUSION

We affirm.

Footnotes

n1 Bedell Finley is identified as an appellant in the notice of appeal, but no brief has been filed on Finley's behalf.

n2 It is difficult to understand this claim as one of disparate impact. Plaintiffs' claim as to the subjective decision making process is not that this facially race-neutral process has an adverse impact on blacks and the

process cannot be justified by business necessity. Rather, Plaintiffs claim the subjective decisionmaking resulted in blacks remaining in center-manager positions longer than whites before they were promoted to the division-manager level. We read Plaintiffs' argument as alleging disparate treatment through the subjective decisionmaking process; that is, that the subjective selection process provided the opportunity for UPS to choose not to promote some employees because they were black--to discriminate on account of race.

n3 Performance was quantified using performance evaluations that UPS conducted on a yearly basis from 1991 until 1995.

n4 The import of the district court's mootness rationale is questionable. On one hand, a Daubert determination in the course of the summary judgment ruling would moot the Daubert motion. But, on the other hand, a summary judgment ruling that finds summary judgment appropriate even if the evidence is admissible would have the same effect. In any event, UPS has not cross-appealed the denial of its evidentiary motions.

n5 Some regressions can be so incomplete in terms of explanatory variables that they lose all probative value with regard to the question of discrimination and are, thus, inadmissible. Bazemore v. Friday, 478 U.S. 385, 400 n.10, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986).

n6 Plaintiffs appear to be of the opinion that the use of an adversary's expert testimony to evaluate the admissibility or probative value of their regressions constitutes a departure from the proper summary

judgment standard. We disagree. It is true that courts may neither weigh the evidence nor make credibility determinations at summary judgment. But, as mentioned, the propriety of summary judgment must be, to a limited extent, based on the probative value of the nonmovant's evidence. We can discern no requirement that experts' testimony such as this must be considered in isolation when a district court assesses probative value.

n7 The relationship between past pay and current pay is of such obvious relevance that the defendant should not have to show its effect to impugn the regression. See Palmer, 815 F.2d at 101. Additionally, when a plaintiff's expert admits that including an explanatory variable would explain the apparent disparity, we do not think a defendant is barred from arguing its omission was erroneous simply because he does not present that factor and its effect in his analysis.

n8 In Bazemore, the past discriminatory pay was inactionable because it occurred before Title VII governed the public employer being sued. Here, pre-1991 (i.e., preclass period) pay, even if discriminatorily set, is inactionable because the limitations period has run. It is the post-1991 (i.e., the class period) discrimination that is at issue; thus, Plaintiffs' asserted disparity during that period must be linked to race, which under Bazemore could include past considerations of race with regard to pay.

n9 Interestingly, given the problems in the performance data explained below, past pay rates may have been a dependable variable to use as a measure of performance, possibly in addition to the performance

data that was available.

n10 Even in those years the data was incomplete.

MELLOY, Circuit Judge, concurring and dissenting.

I concur in the majority opinion on the upward mobility and working conditions claims. However, I respectfully dissent from the majority opinion as to the equal pay claim. I believe the Plaintiff has generated a submissible case on that issue. I would reverse as to the equal pay claim and remand for trial.

This is a case in which all the experts, Defendant's expert included, found a statistically significant difference between pay of white center manager and black center managers at UPS in all years at issue except 1995, for which Defendant's expert found there was no statistically significant difference in pay.

Both parties presented admissible evidence on the issue of pay disparity. All three experts used multiple regression analyses to determine whether the difference in pay was attributable to factors other than race. Each expert identified the factors he or she found to be relevant in determining pay and controlled for these factors in their analyses. Many of the same factors were included in the different studies, such as pay region, performance evaluations, and tenure. The main disagreement between the experts related to performance evaluation data. The issue on appeal came down to whether all available performance data should be included in the analyses or whether two years of performance data was sufficient.

None of the experts included past pay as a factor in their analysis. However, the majority focuses on this would-be factor and upholds summary judgment for the Defendants based on the Plaintiffs' omission of past pay. They do so despite the fact that all three qualified experts chose not to include past pay as a factor. They do so while acknowledging that "it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case." Bazemore v. Friday, 478 U.S. 385, 400, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986).

At the summary judgment stage, "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The question decided by the majority, whether past pay must be added as a factor in order for the Plaintiffs to prove a prima facie case, is a quintessential jury issue.

In considering the evidence in the light most favorable to the Plaintiffs, I would find that the Plaintiffs have generated a jury question on the issue of whether a prima facie case of pay disparity exists. The issue of whether Plaintiffs' duly-qualified experts considered all the appropriate variables is an issue for the jury. Accordingly, I would reverse the grant of summary judgment for the Defendants on the equal pay claim.

Case No. 4:94-CV-1184 (CEJ)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

LESLIE MORGAN, et al.,
Plaintiffs,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., and UNITED PARCEL SERVICE, INC.,
Defendants.

June 26, 2000, Decided
June 26, 2000, Filed

COUNSEL: For LESLIE MORGAN, KENNETH STACKER, THEODORE BOLDIN, plaintiffs: Kevin S. Kinkade, Virginia M. O'Leary, Kelly A. Lonnberg, O'LEARY AND ASSOCIATES, Darlene Robinson, Oakland City, IN.

For VERNON TAYLOR, plaintiff: Kevin S. Kinkade, Virginia M. O'Leary, Kelly A. Lonnberg, O'LEARY AND ASSOCIATES, Oakland City, IN.

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For BENNIE CLARK, JOSEPH HAWKINS, ENOCH LOVE, intervenor plaintiffs: Kevin S. Kinkade, Virginia M. O'Leary, Kelly A. Lonnberg, O'LEARY AND ASSOCIATES, Darlene Robinson, Oakland City, IN.

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JUDGES: CAROL E. JACKSON, UNITED STATES DISTRICT JUDGE.

OPINION BY: CAROL E. JACKSON

OPINION:

MEMORANDUM AND ORDER

This matter is before the Court on various motions. All matters have been fully briefed.

Plaintiffs bring this action pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and 42 U.S.C. § 1981, alleging individual and class claims of employment discrimination. n1 In addition to compensatory and punitive damages, plaintiffs seek equitable relief.

On October 30, 1996, the Court conditionally certified four classes of present and former United Parcel Service, Inc. (UPS) employees. The Court ordered bifurcation of the trial, severing the issues of liability and injunctive relief from the damages phase of the litigation. Further, the Court certified only the issue of liability and the request for injunctive relief as a Rule 23(b)(2) class action, reserving for future consideration certification of the damages issue. On April 25, 1997, the Court entered an order modifying the four classes.

In Count I, plaintiffs claim that UPS has violated Title VII by discriminating against black salaried employees nationwide in the implementation of pay and promotion policies. Specifically, plaintiffs allege that UPS systematically promotes black salaried employees more

slowly and in smaller numbers than white salaried employees. The plaintiffs allege that through subjective selection procedures UPS retards and limits the advancement of black salaried employees. As a result, plaintiffs allege that black salaried employees "peak" at the position of center manager or below. The plaintiffs further allege that black center managers are paid less than similarly-situated white center managers. The plaintiffs allege that these practices are the result of a nationwide policy of discrimination.

As to the Title VII denial of upward mobility claim, the Court certified a class as follows:

With respect to the Title VII claim of denial of overall upward mobility, a class is certified consisting of all black salaried full-time employees of UPS nationwide employed as center managers in Operations (Package, Hub, Feeder, Air) or Human Resources at any time between December 20, 1991 and the date of judgment, and who worked as a supervisory or managerial employee of UPS for at least five years without being promoted above the center manager level.

As to the Title VII unequal working conditions and unequal pay claims, the Court certified a class as follows:

With respect to the Title VII claims of unequal working conditions and unequal pay, a class is certified consisting of all black salaried full-time employees of UPS nationwide employed as center managers in Operations (Package, Hub, Feeder, Air) or Human Resources at any time between December 20, 1991 and the date of judgment.

In Count III, plaintiffs allege that they have been denied overall upward mobility and have been subjected to unequal pay and discriminatory working conditions in violation of 42 U.S.C. § 1981. Specifically, the plaintiffs allege that UPS has refused to contract with black salaried employees for positions above the center manager level. The plaintiffs claim that this refusal has denied them the opportunity to participate in stock option purchase programs and in decision-making regarding the promotion of salaried employees.

As to the 42 U.S.C. § 1981 denial of upward mobility claim, the Court certified a class as follows:

With respect to the 42 U.S.C. § 1981 claim of denial of overall upward mobility, a class is certified consisting of all black salaried full-time employees of UPS nationwide employed as center managers in Operations (Package, Hub, Feeder, Air) or Human Resources at any time on or after June 17, 1989 and the date of judgment, and who worked as a supervisory or managerial employee of UPS for at least eight years without being promoted above the center manager level.

As to the 42 U.S.C. § 1981 unequal working conditions and unequal pay claims, the Court certified a class as follows:

With respect to the 42 U.S.C. § 1981 claims of unequal working conditions and unequal pay, a class is certified consisting of all black salaried full-time employees of UPS nationwide employed as center managers in Operations (Package, Hub, Feeder, Air) or Human

Resources at any time on or after November 21, 1991 and the date of the judgment.

Two of the named plaintiffs, Leslie Morgan and Kenneth Stacker, also bring individual claims under Title VII. In addition, plaintiffs Morgan, Stacker, and Theodore Boldin bring individual § 1981 claims. In Count II, plaintiff Vernon Taylor asserts an individual claim that he was terminated based on his race, in violation of Title VII. In Count IV, Taylor asserts an individual claim of unlawful employment practices under 42 U.S.C. § § 1981 and 1981a. Plaintiffs Bennie Clark, Joseph Hawkins, and Enoch Love were granted permission to intervene to assert individual claims of failure to promote and unequal pay under Title VII and § 1981. The Court also permitted intervention by the Equal Employment Opportunity Commission (EEOC).

I. BACKGROUND

UPS has eleven geographical regions in the United States. A region manager presides over each of the eleven regions. Each region has approximately six districts. The company has a total of more than seventy districts. A district manager presides over each district. Each district is subdivided into divisions which are responsible for different aspects of the defendants' business operations. Each division has a division manager who reports to the district manager. The divisions that are responsible for the pickup, sorting and delivery of packages are called package operations divisions. Each district has several package operations divisions. For example, in the Missouri District there are seven package operations divisions each of which is responsible for a designated geographic area within the

district. Within each package operations division are six to eight package operations centers each supervised by a center manager. The entry-level management position at UPS is supervisor. Supervisors report to center managers.

UPS vests authority in district managers to promote employees to managerial positions at the level of division manager and below. In making these decisions, each district manager utilizes a procedure known as "People's Meetings." During these meetings, held approximately twice a year in each district, information is presented on each supervisor and center manager in the district. During at least some of the meetings, while the individual's performance and readiness for promotion is discussed, a color photograph of the person is displayed. As a result of the meeting, a list is compiled of the employees deemed most ready for promotion. When a promotional opportunity arises, the district manager consults the list and determines who will receive the promotion. Open positions are not posted. The decision to promote a division-level manager to a higher position is made outside of the district.

UPS evaluated its employees until 1993 using the Management Development Profile Analysis (MDPA), and then phased in the Career Development Management Appraisal (CDMA), which is copyrighted by UPS and is used nationwide. Both scales are six-point scales. Each managerial employee uses the MDPA, and later the CDMA, to evaluate the employees he or she supervises. For example, the district manager evaluates division-level managers, division-level managers evaluate center-level managers, and center-

level managers evaluate supervisor-level managers. An employee's salary is directly linked to the employee's performance rating on the CDMA or MDPA. The rating dictates the range of salary increase available to the employee. For example, an employee who received a 5 on her CDMA or MDPA would be eligible for a 6% to 7% increase. Based on these guidelines, managers recommend raises for the employees they supervise. The district manager approves all salary increases.

II. DISCUSSION

UPS moves for summary judgment as to both the Title VII and the § 1981 class claims or, in the alternative, to decertify the class.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Fed. R.

Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material, fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

To establish a prima facie case of discrimination in a class action alleging a pattern or practice of discrimination, plaintiffs must prove that the defendant "'regularly and purposefully'" treated members of the protected group less favorably, and that unlawful discrimination was the employer's "'regular procedure or policy.'" EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 951 (8th Cir. 1999) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 336, 360, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977)). "'Proving isolated or sporadic discriminatory acts by the employer is insufficient.'" Id. (quoting Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875-76, 81 L. Ed. 2d 718, 104 S. Ct. 2794 (1984)). Rather, plaintiffs must establish by a preponderance of the evidence that "'discrimination was the company's standard operating procedure--the regular rather than the unusual practice.'" Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 470 (8th Cir. 1984) (quoting Teamsters, 431 U.S. at 336). Normally, a plaintiff in a pattern and practice action will produce evidence showing statistical disparities between similarly

situated protected and unprotected employees, and the defendant will attempt to show in rebuttal that plaintiffs "'proof is either inaccurate or insignificant.'" Id. (quoting Teamsters, 431 U.S. at 360).

A. Class Claims

1. Denial of upward mobility

In support of their claim of denial of upward mobility, plaintiffs initially presented an analysis conducted by Dr. Hilary Weiner, a Senior Social Science Analyst employed by the EEOC. Dr. Weiner sought to determine whether there was any racial disparity within the UPS divisions in the pattern of promotions from center manager to division manager and whether it takes longer for black employees to be promoted than it takes white employees. She did not do any statistical analysis to attempt to show that the likelihood of promotion is greater for white employees than for black employees.

With respect to the assertion that the pattern of promotions is discriminatory, Dr. Weiner performed a Wilcoxon test. Later, however, after examining the rebuttal reports of defendant's experts, Dr. Weiner acknowledged that she had used an incorrect Wilcoxon test. After performing the correct Wilcoxon test, she determined that no statistical difference existed in the pattern of promotions for black and white center managers to their first division level job.

No longer able to rely on the Wilcoxon test results to show racial discrimination in the pattern of promotions, plaintiffs now rely on Dr. Weiner's finding that there

were no promotions of blacks to division manager in 85 of the approximately 90 UPS districts from between 1989 and 1998. Dr. Weiner, however, did not take into account whether there were any black center managers in those districts who were available for promotion to this higher level. UPS conducted a different analysis, which did take into account the availability factor. UPS's expert, Dr. David S. Evans, found that of the districts where there was at least one promotion, there were 45 districts in which no black center managers were promoted. He then sought to determine whether black promotions would have been expected to occur in those 45 districts had the promotion decisions been made without regard to race. In an effort to make this determination, Dr. Evans conducted a computer analysis of a random selection of the actual promotions in each UPS district within each year. The results showed that the number of districts with no black promotions was actually fewer than would be expected.

The plaintiffs' assertion that the pattern of promotions among districts shows racial discrimination in some districts does not tend to show discrimination on a national level. See Teamsters, 431 U.S. at 336 (plaintiffs must show discrimination was the company's standard operating procedure). It may, in fact, undercut plaintiffs' proof of the existence of a standard operating procedure. Moreover, while center managers are not promoted to division manager positions solely within their own district, Dr. Evans presented evidence that a center manager is promoted to division manager outside his or her district 54% of the time in Human Resources and 10% of the time in Operations. Accordingly, accounting for the availability of black center managers within a district is useful to some

degree. Dr. Weiner acknowledged this by attempting to account for availability in each district with the Wilcoxon test. Nevertheless, plaintiffs' own expert admitted that she found no pattern of discrimination by district. The Court is not persuaded by plaintiffs' attempt to ignore that conclusion and instead rely solely on the fact that there were no black promotions in some districts.

Plaintiffs' experts did not perform any statistical analysis to attempt to show racial disparity in the likelihood of promotion. Instead, plaintiffs submit charts showing the percentage of black division-level employees, compared to the percentage of all black "officials and managers," "operatives and laborers," "blue collar workers," and "total UPS workforce." The charts show standard deviations from the expected rate of "officials and managers" ranging from 3.5 to 15.4.

UPS's expert, Dr. Evans, analyzed the likelihood of promotion by asking whether the actual number of black promotions from center manager to division manager is higher or lower than the expected number of black promotions. Dr. Evans examined whether black promotions by district and by region are consistent with black availability by district and by region. With respect to Operations, Dr. Evans found that in some years the number of black promotions was more than expected and in other years it was less than expected. In the aggregate, Dr. Evans found a net excess of five black promotions in the regional level analysis and a net excess of six black promotions in the district level analysis. In other words, in each situation there were more blacks promoted than would be expected in light of availability and the number of

promotions actually made. With respect to Human Resources, there was a net deficit of three black promotions at the district level and a net deficit of two black promotions at the region level. Accordingly, Dr. Evans found no evidence of race discrimination in the likelihood of promotions.

The analyses relied on by the plaintiffs do not consider the correct population in determining the likelihood of promotion of black center managers. The classes certified by the Court consist of center managers who have not been promoted to division manager and above. Plaintiffs' reliance on comparisons to the entire UPS workforce and other subgroups which include individuals who are not class members is inappropriate. Plaintiffs have not attempted to compare the percentage of black division managers to the population from which they can be promoted. Under either a disparate treatment or a disparate impact theory, plaintiffs' reliance on a bottom line racial imbalance in the workforce is insufficient to establish that blacks are less likely to be promoted. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989) (proper comparison is between racial composition of at-issue jobs and racial composition of qualified persons in the relevant labor market). Additional, plaintiffs claim that UPS's subjective decisionmaking process and its failure to post notices of position vacancies have caused a racial imbalance is unavailing as they have not offered any statistical evidence to support it.

Dr. Weiner also performed a "cohort analysis" in an attempt to show that it took longer for black employees than for white employees to be promoted to division

level positions. In her cohort analysis, Dr. Weiner matched pairs of black and white employees and compared them in terms of the length of time it took for them to reach center manager and division manager level. The conclusion Dr. Weiner reached based on the cohort analysis is that it takes black employees significantly longer to be promoted from their first full-time supervisory position to center manager level and from supervisor to division manager level than it takes similarly situated white employees.

Dr. Weiner conceded, however, that "the data [she] looked at is not appropriate for examining the time to promotion from center manager to division level manager." Plaintiffs argue that it is appropriate to use an analysis that takes into account promotions to center manager level positions because they have never restricted their claim to time to promotion from center manager to division manager. The Court, however, has imposed this limitation by virtue of its definitions of the classes certified in this action. Consequently, the relevant focus is on the difference, if any, in time to promotion from center manager to division manager.

In a "survival analysis" he performed, Dr. Evans studied the time to promotion from center manager to district manager. Based on the results of his analysis, Dr. Evans concluded that the time to promotion from center manager to district manager is longer for white employees than it is for black employees. The Court finds that this analysis more appropriate to the issues involved in this action, as it examines only the time to promotion from center manager to division manager. Because the plaintiffs' evidence is based on Dr. Weiner's analysis which fails to examine the relevant

time period and the relevant population, the Court finds that plaintiffs have not carried their burden of proving discrimination as to the two upward mobility classes.

2. Unequal working conditions

The Court finally finds that plaintiffs have not presented sufficient evidence for a class-based unequal working conditions claim. Plaintiffs do not provide any statistical evidence on any specific difference in working conditions, and instead rely solely on anecdotal evidence. The Court finds such evidence insufficient to show a class-based claim. See Teamsters, 431 U.S. at 336 (plaintiff must show discrimination was company's standard operating procedure); McDonnell Douglas, 191 F.3d at 952 (anecdotal evidence did not demonstrate standard operating procedure).

3. Pay disparity

The Court next turns to the analysis of the class plaintiffs' claims of pay disparity. UPS, plaintiff-intervenor EEOC and the individual plaintiffs also move for summary judgment on the pay claims, and the Court will consider all motions on the issue together.

With respect to pay raises, plaintiffs' experts concluded that there was no statistically significant difference between the salary increases given to black and white center manager level employees during the period 1991 to 1997. In light of this evidence, plaintiffs cannot establish race discrimination on the issue of pay raises. See Hervey v. City of Little Rock, 787 F.2d 1223, 1228-29 (8th Cir. 1986).

The plaintiffs maintain, however, that UPS engaged in racial discrimination with respect to salary levels. On this issue, plaintiffs presented a multiple regression analysis conducted by Dr. Weiner and another conducted by Dr. David C. Stapleton. Dr. Weiner reported after her final analysis a pay differential between black and white center managers of $ 1,275 to $ 2,200 per year, which she found to be statistically significant. UPS attacks Dr. Weiner's analysis on several bases, arguing that it contains both data and methodology errors. UPS argues that Dr. Weiner's original analysis removed much of the observable differences in performance by changing actual performance ratings from the six-point scale to either one or zero. As for data errors, UPS argues that Dr. Weiner uses the wrong matrix in her analysis, which leads to the inclusion in her analysis of a Hispanic individual who was mistakenly entered as having a salary of $ 642 million. In her rebuttal analysis, Dr. Weiner used the full six-point rating scale, but she included only two years of performance evaluations.

Dr. Stapleton found in his analysis that black center managers earned on average $ 562 to $ 852 per year less than white center managers after controlling for factors that cause pay to differ. Defendants also attack Dr. Stapleton's analysis. While UPS agrees that Dr. Stapleton's regression analysis is better than Dr. Weiner's, it argues that Dr. Stapleton's analysis does not include relevant variables, such as time spent as a union member, time spent as a part-time or full-time supervisor, whether the center manager ever worked in Air Operations, whether the center manager was ever a supervisor in Package Operations, and whether the center manager had ever been a division manager.

The principal attack on Dr. Stapleton's analysis, however, is that it does not account for past pay differentials. Dr. Stapleton's regression model includes two previous performance evaluations, although he used the full six-point rating scale in his analysis.

UPS's expert Dr. Evans submitted a regression analysis which included the variables excluded by Dr. Stapleton. Dr. Evans included performance evaluations for every year in which performance evaluations were available. Dr. Evans found that when he did not include performance evaluations in his regression model, the pay differential between black and white center managers was statistically significant, although it was not "substantively significant." When Dr. Evans included all past performance evaluations in his regression model, he found that the pay differential between black and white center managers was not statistically significant.

Dr. Stapleton testified in his deposition that he did not believe all of the variables included by Dr. Evans should be included, as the variables may be caused by race discrimination. He also argues that Dr. Evans should have used dummy variables rather than excluding every individual with any missing data from his analysis.

The Court finds that the variables are properly included in Dr. Evans' analysis. The only variables for which plaintiffs have arguably presented proof of discrimination are the performance evaluations. Several plaintiffs have provided anecdotal evidence that they were given inadequate training and resources to adequately do their job in comparison to white center

managers. While such factors could affect performance evaluations, plaintiffs have not presented evidence that they received lower evaluations for these reasons. The Court finds that the anecdotal evidence is insufficient to provide a basis for excluding performance evaluations from the analysis. See EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 952 (8th Cir. 1999) (anecdotal evidence "demonstrated, at most, isolated discriminatory acts on the part of certain managers, rather than [defendant's] 'standard operating procedure.'") (quoting Teamsters, 431 U.S. at 336); see also Schultz v. McDonnell Douglas Corp., 105 F.3d 1258, 1259-60 (8th Cir. 1997) (probative value of statistical evidence that does not reflect significant differences among employees would be prejudicial and misleading); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 777-78 (8th Cir. 1995) (statistical analysis failed to control for relative assessment score; presence of subjectivity in itself not grounds for challenging evaluation). Accordingly, the Court finds that defendants have shown that any pay disparity between black and white center managers is caused by factors other than race.

B. Individual Claims

It appears that the claims of the individual plaintiffs are based on evidence other than the statistical analyses. To the extent that their claims are based on additional evidence that is specific to each of them, the individual claims of plaintiffs Morgan, Stacker, Boldin, Clark, Hawkins, and Love survive summary judgment.

As to the claims of the individual plaintiffs based on 42 U.S.C. § 1981, there is a split of authority among district courts in this circuit as to whether an at-will

employee in Missouri may bring a claim under § 1981. Compare Filbern v. Habitat for Humanity, Inc., 57 F. Supp. 2d 833 (W.D. Mo. 1999) (at-will employee can still maintain § 1981 claim), with Jones v. Becker Group of O'Fallon Div., 38 F. Supp. 2d 793 (E.D. Mo. 1999) (at-will employee cannot maintain § 1981 claim). This Court agrees with the analysis in Filbern that at-will employees in Missouri can still maintain a claim under § 1981. See Filbern, 57 F. Supp. 2d at 835-36.

C. Vernon Taylor's Claims

UPS moves for summary judgment on Vernon Taylor's separate claims of discriminatory discharge based on Title VII and § 1981.

Taylor worked for UPS from June 1975 until March 1994. At the time of his discharge, he was a center manager at the Laclede center. Among Taylor's responsibilities was the preparation of pre-sheet audit reports. The purpose of the pre-sheet audit is to check the accuracy of the information that a driver records as he delivers packages. To prepare the report, a manager or supervisor records on a form information taken from randomly selected packages before they are delivered. After the driver completes his route, the pre-recorded information is compared to the information that the driver has recorded during his deliveries. If the pre-sheet audit report is prepared "after the fact" from the driver's delivery records, the accuracy of the driver's documentation of the information cannot be measured.

In March 1994, Taylor, in preparation for a regional audit of his center, discovered that pre-sheet audit reports had not been prepared for certain days. To

correct this deficiency, Taylor instructed two employees he supervised to create the reports after the fact. On March 24, 1994, Taylor met with District Manager Chuck Heusser and admitted what he had done. Heusser stated that he considered it an "integrity problem" and told Taylor that he would be discharged for falsifying company documents.

Taylor spoke with Rick Warlick on March 28, 1994, and gave Warlick the names of three other individuals--Galati, Fein, and Irwin--whom Taylor believed had done "things worse" than he had done and not been terminated. Warlick said that he would investigate, and later said that he believed Galati's actions were "nonrelated." Taylor appealed to higher level management officials, but the termination decision was upheld.

The Court will analyze Taylor's individual claims of discrimination under the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). See Ryther v. KARE 11, 108 F.3d 832, 836 (8th Cir.) (en banc), cert. denied, 521 U.S. 1119, 117 S. Ct. 2510, 138 L. Ed. 2d 1013 (1997). The analysis applies both to claims brought under Title VII and 42 U.S.C. § 1981. See Kim v. Nash Finch Co., 123 F.3d 1046, 1056 (8th Cir. 1997).

Under the burden-shifting analysis, plaintiff must first establish a prima facie case of intentional discrimination. McDonnell Dougla's, 411 U.S. at 802; Kim, 123 F.3d at 1056. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to

articulate a legitimate, nondiscriminatory reason for the adverse employment action. McDonnell Douglas, 411 U.S. at 802. If the defendant articulates such a reason, the plaintiff must then demonstrate that defendant's reason is a pretext for discrimination. Id.; Kim, 123 F.3d at 1056. The burden of proving discrimination remains on the plaintiff at all times. St. Mary's Honor Center, 509 U.S. at 515-16. The plaintiff must do more at the pretext stage than discredit defendant's reason; the plaintiff must show the defendant's articulated reason is a pretext for discrimination. See id.; see also Ryther, 108 F.3d at 837; Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 777 (8th Cir. 1995).

In order to avoid summary judgment, a plaintiff alleging discrimination must present evidence that, when viewed in its entirety, (1) creates a fact issue as to whether the employer's proffered reason is pretextual, and (2) creates a reasonable inference that a discriminatory motive was a determinative factor in the adverse employment decision. Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996); see also Krenik v. County of LeSueur, 47 F.3d 953, 958 (8th Cir. 1995). Evidence of pretext alone is not sufficient to avoid summary judgment. Ryther, 108 F.3d at 837.

To establish a prima facie case of employment discrimination under Title VII, plaintiff must show that (1) he belongs to a protected group; (2) he was performing his job at a level that met defendant's legitimate expectations; (3) he was discharged; and (4) the discharge occurred under circumstances that create an inference of unlawful discrimination. Williams v.

Ford Motor Company, 14 F.3d 1305, 1308 (8th Cir. 1994).

Initially, the Court will assume that Taylor has established a prima facie case. However, UPS has articulated a legitimate, non-discriminatory reason for Taylor's discharge, and Taylor has not shown that reason to be pretextual.

In his deposition, Taylor testified that in 1992 a supervisor instructed him to create after the fact documentation for an "OJS ride" based on delivery records and that other employees had created presheet audit reports after the fact. Taylor, however, presents no evidence that the individuals responsible for the decision to terminate him knew of other employees who had engaged in the same conduct for which he was terminated. See Ghane v. West, 148 F.3d 979, 982 (8th Cir. 1998) (plaintiff has burden to show he is similarly situated in all relevant aspects to individuals who were treated more favorably). He testified, in fact, that when he told Chuck Heusser his actions were common practice in the district, Heusser responded that he was new to the district and could not condone a manager with an integrity problem. Taylor did not provide to UPS the names of other individuals who had engaged in the same conduct, and he does not specify what conduct Galati, Fein, or Irwin engaged in that was worse than his conduct. Taylor has presented no evidence that a discriminatory motive was a determinative factor in his termination. See Ryther, 108 F.3d at 837.

To the extent Taylor asserts individual claims of denial of promotion or unequal pay, he has presented no evidence of discrimination with respect to those issues

that are specific to him. Accordingly, summary judgment will be granted as to Taylor's discharge claims based on Title VII and § 1981.

D. Theodore Boldin's Claims

UPS moves to supplement and renew its previous motion for summary judgment as to individual plaintiff and class representative Theodore Boldin. The Court denied a motion for summary judgment as to Boldin's claims in an order dated February 13, 1996. UPS argues in its motion to supplement and renew summary judgment that Boldin's claim against UPS was not identified as an asset in his bankruptcy case. UPS argues that Boldin has not moved the bankruptcy court to reopen his file, as he previously represented to the Court he was willing to do. Boldin responds that he asked the bankruptcy trustee if the case needed to be reopened. He submits letters concerning the inquiry as to whether the case should be reopened, and an affidavit from his attorney in the bankruptcy case. UPS has also moved to strike the affidavit.

Even without considering the affidavit of Boldin's attorney, it appears that Boldin has inquired as to whether the bankruptcy proceedings should be reopened. Defendant's motion for summary judgment as to Boldin's claims will be denied, and the motion to strike the affidavit will be granted.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that defendant's motion for summary judgment as to the class claims [# 391] is granted.

IT IS FURTHER ORDERED that defendant's motion to decertify the class [# 391] is denied as moot.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment on the class claims of pay disparity [# 361] is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment as to plaintiff Vernon Taylor's individual claims [# 362] is granted. The individual claims of plaintiff Vernon Taylor in Counts II and IV of the complaint are dismissed.

IT IS FURTHER ORDERED that defendant's motion for summary judgment as to plaintiff Theodore Boldin's claims [# 360] is denied.

IT IS FURTHER ORDERED that defendant's motion to strike the affidavit of Richard Alan Cooper [# 399] is granted.

IT IS FURTHER ORDERED that defendant's motion to strike the affidavit of Dr. Hilary Weiner [# 374] is denied as moot.

IT IS FURTHER ORDERED that defendant's motion to strike the affidavit of Dr. Richard Harvey [# 374] is denied as moot.

IT IS FURTHER ORDERED that defendant's motion to strike the affidavit of Timothy Dall [# 0, filed 4-3-00] is denied as moot.

IT IS FURTHER ORDERED that defendant's motion for leave to file the affidavit of Troy Barger [# 0, filed 4-3-00] is granted.

IT IS FURTHER ORDERED that plaintiff Boldin's motion to substitute to correct a typographical error [# 363] is granted.

IT IS FURTHER ORDERED that plaintiffs' motion for leave to seek a Daubert hearing [# 380] is denied as moot.

IT IS FURTHER ORDERED that defendant's motion to bifurcate the individual and class claims [# 428] is denied as moot.

IT IS FURTHER ORDERED that defendant's motion for a protective order regarding pretrial material [# 424] is denied as moot.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 26th day of June, 2000.

Footnotes

n1 Counts I and III assert claims on behalf of the named plaintiffs and members of the classes. Counts II and IV assert Title VII and § 1981 claims on behalf of Vernon Taylor.

No. 4:94-CV-1184 CEJ

UNITED STATES DISRTICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LESLIE MORGAN, et al.,

vs.

UNITED PARCEL SERVICE OF AMERICA, INC.
and UNITED PARCEL SERVICE, INC.,
Defendants.

Filed May 10, 2002

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of defendant and against plaintiffs as to all class claims and as to plaintiff Vernon Taylor's discriminatory discharge claim, in accordance with the Memorandum and Order entered on June 26, 2000.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 10th day of May, 2002.

No. 4:94-CV-1184 CEJ

UNITED STATES DISRTICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LESLIE MORGAN, et al.,

vs.

UNITED PARCEL SERVICE OF AMERICA, INC.
and UNITED PARCEL SERVICE, INC.,
Defendants.

Filed April 25, 1997

MEMORANDUM AND ORDER

This matter is before the Court on the motion of the defendants for clarification of the scope of the four classes conditionally certified in this case. The plaintiffs have filed a response in opposition to the motion.

Plaintiffs bring this action pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. S 2000e et seq. ("Title VII") , and 42 U.S.C. S 1981, alleging individual and class claims of employment discrimination. On October 30, 1996, the Court conditionally certified four classes of present and former United Parcel Service, Inc. ("UPS") employees.

In the present oration, the defendants argue that clarification is required- because the current classes are "confusing" and "inconsistent."' fn1 First, the defendants argue that the classes should be limited to

individuals who have worked at the center manager level in operations or Human Resources. This was the Court's intention in the original class certification order the Court so fn2; therefore, to remove any ambiguity, the Court will modify the class description to reflect that the classes are limited to individuals who have worked as center managers in Operations or Human Resources.

Next, the defendants argue that all four classes should be limited to individuals employed as center managers for at least five years without being promoted further. As to the claims of denial of upward mobility, the Court, as reflected in the original Order, intended to impose a prerequisite number of years of supervisory employment in order to qualify for class membership. In other words, an individual must have worked in a supervisory position for at least five years, or eight years with respect to the § 1981 claim, in order to fall within a class asserting denial of upward mobility. In addition, a Title VII class member must have been employed as a center manager at some time between December 20, 1991 and the date of judgment without being promoted further. Likewise, a § 1981 class member must have been employed as a center manager at some time between June 17, 1989 and the date of judgment without being promoted further. However, the Court did not intend to limit class membership to individuals who had been employed at the center manager level for a minimum number of years. To remove any ambiguity, the Court will appropriately modify the descriptions of the two denial of upward mobility classes.

As to the unequal pay and unequal working condition classes, the Court never intended to impose a minimum number of years requirement. Therefore, the Court will not modify these class descriptions in that respect.

Finally, the defendants argue that the classes should not include individuals who worked as center managers only on a temporary basis, i.e., during peak season. At the December 4, 1996 scheduling conference the parties agreed that the classes would include only individuals who had been permanently assigned to a center manager position. Therefore, this issue is not in dispute and no further clarification is required.

Accordingly,

IT IS HEREBY ORDERED that the motion of the defendant for clarification is granted in part and denied in part.

IT IS FURTHER ORDERED that the four classes conditionally certified in this case on October 30, 1996 are modified as follows:

As to the Title VII denial of upward mobility class, the Court modifies the class as follows:

With respect to the Title VII claim of denial of overall upward mobility, a class is certified consisting of all black salaried full-time employees of UPS nationwide employed as center managers in operations (Package, Hub, Feeder, Air) or Human Resources at any time between December 20, 1991 and the date of judgment, and who worked as a supervisory or managerial employee of UPS for at least five years without being

RESULTS OF STANDARD DEVIATION CALCULATION		
BLACKS ADV IMP	NUM. OF STD.DEV. BLACKS	NUM OF BLACKS UNDERREP.
YES	14.19	208.9
YES	13.85	202.9
YES	14.01	208.9
YES	14.17	215.7
YES	17.95	317.9

fn1 Office of Federal Contract Compliance Programs

* Number of blacks and total number of black and white in center manager positions compiled from data provided by UPS. Number of blacks in EEO category and total number of black and white in EEO category pulled from UPS's EEO-1 report for that year.

ADVERSE IMPACT ANALYSIS OF BLACKS AT CENTER MANAGER LEVEL
(JOB GROUP 70 ON DECEMBER 31ST) IN DATA PRODUCED BY UPS
COMPARED TO UPS OPERATIVES AND LABORERS ON EEO-1s
UPS PROVIDED TO THE OFCCP fn1

JOBS	YEAR	DATA			
		BLACKS in Operatives & Laborers	BLACKS in Center Manager Positions	TOTAL Blacks & Whites in Operatives & Laborers	TOTAL Blacks & Whites in Center Manager positions
Mid Manager	1990	25,184	285	140,149	3,325
Mid Manager	1991	24,444	302	139,636	3,493
Mid Manager	1992	24,787	320	141,165	3,634
Mid Manager	1993	25,764	354	144,038	3,836
Mid Manager	1994	34,128	370	163,527	3,950

RESULTS OF STANDARD DEVIATION CALCULATION		
BLACKS ADV IMP	NUM. OF STD.DEV. BLACKS	NUM OF BLACKS UNDERREP.
YES	14.29	210.8
YES	13.95	204.9
YES	14.05	209.1
YES	14.18	215.3
YES	18.01	318.2

fn1 Office of Federal Contract Compliance Programs

* Number of blacks and total number of black and white in center manager positions compiled from data provided by UPS. Number of blacks in EEO category and total number of black and white in EEO category pulled from UPS's EEO-1 report for that year.

ADVERSE IMPACT ANALYSIS OF BLACKS AT CENTER MANAGER LEVEL (JOB GROUPS 70 & 71 ON DECEMBER 31ST) IN DATA PRODUCED BY UPS COMPARED TO UPS OPERATIVES AND LABORERS ON EEO-1s UPS PROVIDED TO THE OFCCP fn1

JOBS	YEAR	DATA			
		BLACKS in Operatives & Laborers	BLACKS in Center Manager Positions	TOTAL Blacks & Whites in Operatives & Laborers	TOTAL Blacks & Whites in Center Manager positions
Mid Manager	1990	25,184	286	140,149	3,383
Mid Manager	1991	24,444	304	139,636	3,562
Mid Manager	1992	24,787	324	141,165	3,735
Mid Manager	1993	25,764	358	144,038	3,941
Mid Manager	1994	34,128	375	163,527	4,055

RESULTS OF STANDARD DEVIATION CALCULATION		
BLACKS ADV IMP	NUM. OF STD.DEV. BLACKS	NUM OF BLACKS UNDERREP.
YES	14.59	218.5
YES	14.27	212.9
YES	14.46	219.8
YES	14.62	226.9
YES	18.44	331.5

fn1 Office of Federal Contract Compliance Programs

* Number of blacks and total number of black and white in center manager positions compiled from data provided by UPS. Number of blacks in EEO category and total number of black and white in EEO category pulled from UPS's EEO-1 report for that year.

(2)

Supreme Court, U.S.
FILED
MAR 25 2005
OFFICE OF THE CLERK

No. 04-1123

In the
Supreme Court of the United States

LESLIE MORGAN, KENNETH STACKER, AND THEODORE BOLDIN, ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT,

Petitioners,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., AND UNITED PARCEL SERVICE, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied this Court's precedents in holding that nationwide classes could not prevail on their pay discrimination claims because the statistical analyses showed no classwide disparity when all major factors affecting pay were considered, and other undisputed facts argued against an inference of a pattern or practice of classwide discrimination.

2. Whether the Court of Appeals properly applied this Court's precedents in holding that nationwide classes could not prevail on their promotion discrimination claims because the undisputed evidence was that there was no classwide discrimination as to the promotions at issue.

3. Whether the Court of Appeals properly applied this Court's precedents concerning summary judgment in holding that nationwide classes failed to produce sufficient probative evidence upon which a reasonable jury could find classwide discrimination in pay or promotions caused by a classwide policy or practice.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are named in the caption, except that Plaintiffs' individual claims were resolved at the District Court level and they did not participate in their individual capacities in the Court of Appeals. Additionally, the Equal Employment Opportunity Commission (the "EEOC") intervened and actively participated in the proceedings in the District Court, but was not involved in the proceedings in the Court of Appeals. Plaintiffs in their individual capacities and the EEOC are not parties to the proceedings before this Court. *See* S. Ct. Rule 12.6.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

1. The parent company of defendant United Parcel Service of America, Inc. is United Parcel Service, Inc., a Delaware corporation different from defendant United Parcel Service, Inc.

2. The parent companies of defendant United Parcel Service, Inc. are United Parcel Service Worldwide Forwarding, Inc.; United Parcel Service of America, Inc.; and United Parcel Service, Inc., a Delaware corporation different from defendant United Parcel Service, Inc.

3. No other publicly held company holds 10% or more of the stock of either defendant.

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Plaintiffs, Center Managers at United Parcel Service ("UPS"), filed this Title VII and § 1981 suit in 1994 alleging discrimination in (1) promotion and (2) pay and working conditions. 34a-35a; App. 77-79.[1] Despite the decentralization of UPS's employment decisionmaking among more than 60 autonomous Districts, the District Court for the Eastern District of Missouri certified nationwide classes of Center Managers as to each claim. 68a-69a, 81a-83a.

Following more than six years of discovery, including document and data production going back to 1989, over 100 depositions, and multiple expert reports, the District Court granted UPS summary judgment on all claims. 9a, 55a-56a. The Court of Appeals for the Eighth Circuit affirmed this judgment and denied rehearing *en banc*. 27a, 84a. Both courts held, after extensive reviews of the record, that Plaintiffs failed to present probative evidence of a pattern or practice of classwide discrimination as required by this Court's precedents. 14a-15a, 21a-27a, 42a-49a.

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[1] References to a number followed by "a" are to the Appendix to the Petition; references to "App." and "Supp. App." are to the Appendix and Supplemental Appendix in the Court of Appeals.

In an effort to persuade the Court that this case is worthy of review, Plaintiffs focus on a few pieces of evidence taken out of context which they argue establish their claims – ignoring other undisputed facts which compelled judgment against them. We will attempt not to burden the Court with a detailed recitation of facts, but are compelled by S. Ct. Rule 15.2 to set the record straight on certain critical points.

a. UPS's Decentralized Structure and Employment Decisionmaking

Plaintiffs concede that UPS's operations are decentralized at the District level and that "District Managers are responsible for nearly every aspect of district operations, including . . . employee development, promotion, and compensation." Pet. at 4-5; *see* App. 2000-01, Supp. App. 36-37. Each of UPS's 11 geographic Regions in the United States is presided over by a Region Manager and subdivided into approximately six Districts, each in turn presided over by a District Manager. App. 1990-92, 2001. Districts function autonomously and vary in operational difficulty, size, population, package volume, and labor climate. Supp. App. 25, 40-44.

Districts are divided into operations functions and supporting staff functions such as human resources, each headed by a Division Manager who reports to the District Manager. Supp. App. 36-37. Each aspect of an Operations Division is headed by a Center Manager who reports to the appropriate Division Manager. App. 215, Supp. App. 33-35. The entry level managerial

position at UPS is Supervisor; Supervisors report to local Center Managers. 68a.

Both courts below noted that UPS's decentralized employment decisionmaking made it difficult for Plaintiffs to prove a pattern or practice of nationwide discrimination, especially when the undisputed evidence was that the District Managers who make employment decisions had not discriminated in certain areas. 12a-13a, 26a, 42a.

b. The Interrelation Between Pay and Past Pay Factors, Including Performance

Both sides' experts agreed that there was no discrimination in Center Managers' annual salary increases and no difference in overall pay if explanatory variables for past pay such as past performance were taken into account. App. 579, Supp. App. 288-89, 306-09, 342-43. Plaintiffs contend that they nonetheless should prevail as to pay because District Managers determine Center Managers' starting salaries "subjectively" without sufficient "guidelines" and that performance as a Supervisor "plays no part" in the process. Pet. at 5. However, the undisputed record establishes that District Managers' pay decisions are made in a way that builds in consideration of employees' tenure in certain areas of operations and managerial positions and their past pay and performance in those positions. App. 575.

Each managerial job at UPS is assigned a salary level or grade that includes a range of salaries to reflect

employees' varying experience and performance as well as their geographic assignments. Supp. App. 253-54, 470-71, 521. A manager's pay has two components: the base salary assigned at the time of promotion to a new position and the annual salary increases received while in that position.[2] Supp. App. 287, 475-78.

The base salary that accompanies a managerial promotion reflects a percentage increase over the employee's previous salary that takes into account the District Manager's assessment based on input from lower managers of his or her new job responsibilities and the salaries of others in that job. Supp. App. 198, 201-03, 475-78. Thus, a Center Manager's base salary is related to the employee's pay as a Supervisor, which is related to the base salary that accompanied the promotion to Supervisor and subsequent salary increases in that position.

A managerial employee's annual salary increase is directly tied to the employee's performance ratings as determined by his or her immediate manager. Supp. App. 57. The form used by UPS for most of the class period included an assessment of the employee's

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[2] Plaintiffs complain about the Court of Appeals' use of the term "base pay" and assert that base pay means an employee's annual salary without stock award and bonus. Pet. at 10 n.3. As did UPS in its brief, the court used the term "base pay" to refer to the initial salary assigned upon a promotion before any salary increases for job performance. 21a-22a. The experts' final studies of pay included both base pay and salary increases but not stock awards and bonuses. App. 570, 2027, 2114; Supp. App. 287.

performance of up to five pre-selected job responsibilities and an evaluation of 50 general management skills. Supp. App. 59-61, 69. Center Managers and Division Managers make recommendations to their District Manager concerning salary increases for the Supervisors and Center Managers they supervise, and the District Manager makes the final determinations. 39a; Supp. App. 57.

Plaintiffs assert that experts for both sides concluded that there were statistically significant differences in Center Managers' pay for every year from 1991 through 1994 and also in 1996 and 1997. Pet. at 5. To the contrary, both courts below recognized that the analyses of UPS's expert Dr. Evans demonstrated that any difference in pay disappeared as more performance ratings were included. App. 577-79; 18a, 48a. As the courts further recognized, Plaintiffs' expert Dr. Stapleton admitted that "accounting for the[se] past pay differentials . . . really explains the difference in the [experts'] results." Supp. App. 309; 24a, 48a.

Dr. Stapleton excluded historical pay variables, which he recognized were "essentially proxying for past earnings," because it would be "explaining current pay experience by past pay experience." Supp. App. 300, 319. However, he admitted that there was no evidence of discrimination in past pay or its proxies, including performance ratings. Supp. App. 306-13. Both courts below relied on Plaintiffs' failure to show any discrimination in past pay factors in holding that there was no basis to exclude them from the analyses. 23a-24a, 48a-49a. The Court of Appeals also noted the

lack of any proof of discrimination as to Center Managers' salary increases, promotions, and working conditions, all of which were set by the same District Managers who determined base salaries. 26a-27a.

c. The Lack of Discrimination in the Promotion of Center Managers

Both sides' experts concluded that there was no discrimination in the promotion of Center Managers to Division Manager. App. 591, 2111. Despite this fact, Plaintiffs continue to press their promotion claims based on assertions of a lack of objective standards and procedures, discrimination in the promotion of Supervisors, a racial imbalance in UPS's general workforce, and discrimination in the promotion of Center Managers in certain Districts. Pet. at 6-8. These assertions are either belied by the record or irrelevant in light of the undisputed fact that there was no nationwide discrimination in the only promotions as to which classes were certified.

UPS gives District Managers the authority to promote employees to managerial positions within their Districts at the level of Division Manager and below. 68a; Supp. App. 52-54. In making promotion decisions, each District Manager uses information concerning Supervisors' and Center Managers' performance and readiness for promotion which is presented at "People's Meetings" held twice a year to evaluate managerial employees in the District. *Id.* The District Human Resources Manager may display an

employee's photograph for the benefit of those who do not know him or her by name. Supp. App. 52.

When a promotion opportunity arises, the District Manager consults lists compiled at the People's Meetings of the employees deemed most ready for promotion to that position. App. 216; Supp. App. 52. Although experience gained in both Supervisor and Center Manager positions is considered in evaluating an employee's promotion to Division Manager, the progression is from Supervisor to Center Manager to Division Manager. Supp. App. 430-31. The District Manager may select any qualified Center Manager in the District to fill an opening for Division Manager or determine that there is no suitable candidate in the District. Supp. App. 47-48.

Plaintiffs rely on a cohort analysis by their expert Dr. Weiner which purports to conclude that it takes black Supervisors longer to be promoted to Center Manager and then Division Manager. Pet. at 7; App. 2111-13. Both courts below held this analysis to be irrelevant to the class claims, recognizing that Dr. Weiner admitted "it is inappropriate . . . to examine time to promotion from Center Level Manager to Division Level Manager." App. 2113; 14a, 44a-45a.[3] The District Court specifically excluded Supervisors

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[3] Although Plaintiffs assert that UPS "did not rebut" their cohort analysis (*see* Pet. at 15), UPS demonstrated that it had significant flaws, including its failure to consider performance. Supp. App. 325-26, 357-58, 559-62.

from the classes to avoid conflicts between them and the Center Managers who supervised them. 77a.

Plaintiffs also cite statistics comparing the racial make-up of UPS's Division Managers with all managerial employees and the overall workforce. Pet. at 7; 98a-102a. The courts below held that these comparisons are equally irrelevant because they do not focus on the pool of employees from which Division Managers are chosen. 13a-15a, 44a. UPS employees do not skip over the Supervisor and Center Manager positions, and Supervisors are not eligible for promotion to Division Manager. Supp. App. 430-31.

Finally, Plaintiffs assert that there were no blacks promoted to Division Manager in 45 Districts during the class period, and more than 800 promotions of whites overall. Pet. at 7; App. 2072-75. The courts below noted that these figures do not take into account the fact that UPS generally promotes Center Managers within the District to Division Manager. 12a, 42a-43a. UPS's expert Dr. Evans performed an analysis which determined that more blacks were promoted to Division Manager than would be expected considering the availability of qualified candidates and the number of promotions in each District. App. 591. Overall, more than 90 blacks were promoted. App. 2072-75. The courts also noted that in any event evidence of discrimination in only some Districts would tend to disprove and not establish nationwide discrimination. 12a-13a, 42a.

REASONS FOR DENYING THE WRIT

This case presents a straightforward and correct application of the governing law to undisputed facts. Although Plaintiffs contend that the Court of Appeals "rejected" this Court's precedents concerning proof of pay discrimination, the proper applicant pool to analyze in promotion discrimination cases, and the standards for summary judgment (*see* Pet. at i, 8, 13), in fact the court relied on the very cases Plaintiffs claim as the controlling law. Thus:

- the court relied on *Bazemore v. Friday*, 478 U.S. 385, 400 & n.10 (1986), in holding that Plaintiffs' statistical analyses of pay were not probative of discrimination because they did not account for the major factors that determined pay at UPS (22a-23a);
- the court held that Plaintiffs' evidence on promotion did not focus on the proper pool of employees from which Division Managers are chosen (Center Managers within the District), as required by *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988) (13a); and
- the court held that UPS was entitled to summary judgment under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986), because Plaintiffs had not presented evidence on which the jury could reasonably find in their favor (21a, 26a-27a).

Accordingly, the decision below presents no conflict with this Court's precedents and no question worthy of review. *See* S. Ct. Rule 10.

I. The Summary Judgment in Favor of UPS on Pay Was Compelled by This Court's Precedents, Including *Bazemore*, in Light of the Lack of Probative Evidence of a Pattern or Practice of Nationwide Discrimination.

Plaintiffs claim that in denying them (and granting UPS) summary judgment on pay, the Court of Appeals decided an important federal question in a way that conflicts with this Court's decisions in *Bazemore v. Friday*, 478 U.S. 385 (1986), and *National Railroad Passenger Corp. v. Morgan (AMTRAK)*, 536 U.S. 101 (2002). Pet at 8. To the contrary, the Court of Appeals' decision simply applied this Court's well-established precedents to the undisputed facts of this case. There is no conflict and no question worthy of review.

Plaintiffs argue that the experts' analyses showed differentials in Center Managers' pay and established a *prima facie* case of discrimination, and that UPS did not prove the differentials were due to permissible factors. Pet. at 9-12. This argument simply stands the facts of this case and the law on their heads.

Both sides' experts agreed that there was no pay differential when past pay factors were considered, and Plaintiffs had no justification for excluding those factors from the analyses. The undisputed facts demonstrated that present pay depends largely on past positions, pay, and performance; that UPS's employment decisionmaking is decentralized; and that District Managers did not discriminate in setting Center Managers' salary increases, promotions, or working

conditions. These facts not only justified but compelled summary judgment for UPS under this Court's precedents.

To prevail under either a disparate treatment or disparate impact theory of liability, Plaintiffs had to present a *prima facie* case of classwide discrimination caused by a classwide discriminatory policy or practice. A plaintiff in a disparate treatment case must establish that "discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). A plaintiff in a disparate impact case likewise must show that a discriminatory practice "has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988); *see Wards Cove Packing Co. v. Atonio*, 490 US. 642, 657 (1989).

As the Court of Appeals recognized, this Court has noted that the "usefulness [of statistics] depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340, quoted at 20a. This Court also has held that even if an expert's statistical study is admissible, summary judgment still may be appropriate if the "evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596

579, 596 (1993).[4] As the Court of Appeals aptly stated, this is just such a case: a "reasonable inference of [pay] discrimination does not arise" because "Plaintiffs' regressions fail to take into account past pay, performance, or both" and "when evaluated in the context of the undisputed facts, . . . fail to create a triable case of pattern-or-practice discrimination." 21a.

Plaintiffs base their pay claims on isolated aspects of the expert report of UPS's expert Dr. Evans, asserting that he showed that UPS paid black Center Managers less than whites. Pet. at 9-10. Both courts below correctly rejected this assertion, noting that Dr. Evans' regression analyses demonstrated that any disparity in pay disappeared when sufficient performance ratings were included. 18a, 48a; Add. 577-79. Plaintiffs are not entitled to rely on a portion of an expert's report taken out of context and ignore his ultimate conclusion. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988).

Plaintiffs argue that this Court's decision in *Bazemore* does not permit consideration of the effect of past performance and other pay factors on current pay. Pet. at 10. To the contrary, as the Court of Appeals explained, the exclusion of past pay from the regressions in *Bazemore* was proper because the lower courts concluded that the defendant had discriminated

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[4] Although the Court of Appeals conducted its own analysis of the record, UPS submits that it could have deferred to the District Court's analysis of the expert evidence. *See General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997).

in setting past pay. 23a; *see* 478 U.S. at 394. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 207-10 (1974) (holding that current system of paying night staff more perpetuated past discrimination against women, who previously were not permitted to work at night); *AMTRAK*, 536 U.S. at 112 (noting that the question is not "mere continuity" of past discrimination but whether there is a "present violation"). Here, in contrast, the courts below recognized that there was no evidence that past pay or performance evaluations were discriminatory. 23a-24a, 48a-49a.[5]

Indeed, this Court recognized in *Bazemore* that regression analyses which do not "account[] for the major factors" may be "considered unacceptable as evidence of discrimination," and even "so incomplete as to be inadmissible as irrelevant." 478 U.S. at 400 & n.10. The courts below correctly held based on undisputed evidence that Plaintiffs' regressions fall into this category. 21a-24a, 47a-49a.

The record establishes beyond doubt how Center Managers' pay at UPS is determined and the historical factors that affect it, including pay and performance over time in previous positions. Supp. App. 198, 201-03, 475-78. Contrary to Petitioners' assertion, UPS

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[5] Plaintiffs refer to past pay as a "defense" to their showing of unequal pay and contend that they should prevail because UPS failed to prove that the inequality was justified by a factor other than race. Pet. at 10, 11. In fact, it is Plaintiffs who did not make out a *prima facie* case of race discrimination.

never "conceded it does not use past pay in determining current pay" (*see* Pet. at 11)[6] – and the point is belied by the system in place for determining pay. A Center Manager's base salary is set by applying a percentage increase to his or her pay as a Supervisor, which in turn is based on the hourly pay received before becoming a Supervisor and consecutive annual salary increases tied to performance as a Supervisor.

There also is no dispute that any disparity in Center Managers' pay was eliminated with the inclusion of past pay factors. Plaintiffs' expert Dr. Stapleton recognized that UPS's historical variables in UPS's statistical analyses were proxies for past pay and admitted that "accounting for the[se] past pay differentials . . . really explains the difference in the [experts'] results." Supp. App. 300, 309. He further admitted that there was no evidence of discrimination in these variables, including performance ratings, that

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[6] For this "concession," Plaintiffs rely on a statement by Kent C. Nelson (in a deposition years after he retired as UPS's Chief Executive Officer) that he reviewed salaries of blacks and whites based on tenure and job category. Pet. at 11; 111a. This broad overview of compensation is not part of the decentralized process by which local District Managers set Center Managers' pay.

Plaintiffs also rely on UPS deposition testimony that performance evaluations are not used to set a Center Manager's base salary upon promotion to that position. 119a. However, past performance has already been incorporated into the employee's salary as a Supervisor through annual salary increases which were based on performance reviews. Supp. App. 198, 201-03.

could justify their exclusion from his analyses. Supp. App. 306-13.

Relying on these undisputed facts, the Court of Appeals correctly held that statistical analyses which omitted past pay variables were incomplete and insufficient evidence of discrimination. 22a-24a. That holding is in complete accord with *Bazemore*. As the court noted, the lack of probative value of such analyses is underscored by undisputed facts concerning UPS's decentralized decisionmaking, the lack of any direct evidence of discrimination, and the experts' agreement that the same District Managers responsible for setting Center Managers' base salaries did not discriminate with respect to their salary increases or promotions. 26a-27a; *see* pp. 2-3, 6, *supra*. In the words of the court, in light of all these facts "[i]t would be manifestly unreasonable to infer from Plaintiffs' regression analyses that UPS set center managers' base pay lower for blacks as a matter of practice all across the country." 27a.

II. The Summary Judgment in Favor of UPS on Promotion Was Compelled by This Court's Precedents, Including *Watson*, in Light of the Undisputed Evidence That There Was No Nationwide Discrimination as to the Promotions at Issue.

Plaintiffs also ask this Court to review the summary judgment entered in favor of UPS on their promotion claims, contending that both courts below disregarded this Court's decision in *Watson*. Pet. at 13.

Here, too, the courts correctly applied established precedents to the undisputed facts. There is no conflict and no question worthy of review.

Plaintiffs contend that the courts below also disregarded Eighth Circuit precedents, namely, *Emanuel v. Marsh*, 897 F.2d 1435 (8th Cir. 1990), and *Paxton v. Union National Bank*, 688 F.2d 552 (8th Cir. 1982). Neither the panel, which was unanimous as to promotion, nor the Court of Appeals as a whole perceived any conflict with Eighth Circuit authorities that would justify rehearing. In any event, such a conflict is not one of the considerations listed as a basis for review by this Court. *See* S. Ct. Rule 10.

Plaintiffs argue that the courts below distorted their claims and relied on the wrong workpool in analyzing them. Pet. at 13. To the contrary, it is Plaintiffs who have consistently refused to understand the limitations of the classes that were certified as to promotion, or to accept the facts established by the record and their own expert's conclusions. The District Court deliberately defined the classes to include only Center Managers, and the evidence was undisputed that only those employees were eligible for promotion to Division Manager and that District Managers generally made such promotions from within their Districts. Most significantly, every expert who studied promotions concluded that there was no statistical evidence of nationwide discrimination in the promotion of Center Managers to Division Manager.

According to Plaintiffs, their promotion claim is "that blacks who reach the level of Center Manager do not move from *full-time Supervisor* **to** and **beyond** *Division Manager* as fast as whites, and do not move as far as whites." Pet. at 20 (emphases in original). Although Plaintiffs may have sought to bring that claim, the District Court clearly certified classes only as to promotions from Center Manager to Division Manager. 77a-78a. The court noted that broader classes would mean that "class members who are supervisors would be challenging the conduct of center managers" who "would be forced to defend the very conduct they are challenging," and that such issues already had arisen at the certification hearing. 77a. Plaintiffs did not appeal the class definitions, which are in accord with this Court's teachings in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997), concerning class conflicts.

Plaintiffs also did not proffer sufficient evidence of discrimination in the promotion of the classes that were certified to defeat summary judgment. Both courts below relied on the conclusion of Plaintiffs' own expert Dr. Weiner that there was "no statistical difference in the pattern of promotions for Black and White Center Level Managers to their first Division Level Manager job." A. 2111; 12a, 41a. Although Plaintiffs also claimed that no black Center Managers were promoted to Division Manager in 45 Districts (Pet. at 7), UPS's expert Dr. Evans conducted a study which showed that more blacks were promoted from Center Manager to Division Manager than would be expected in light of

availability of qualified candidates and the number of promotions in each District. App. 580, 586, 590-91. In any event, as the courts recognized, proof of discrimination in only some but not all Districts would tend to disprove rather than establish nationwide discrimination. 12a-13a, 42a.

Unable to establish discrimination as to Center Managers' promotions, Plaintiffs rely on a flawed cohort analysis by Dr. Weiner purporting to conclude that it took blacks longer than whites to be promoted from Supervisor to Center Manager and then Division Manager. Pet. at 14. The courts below correctly held that this study was not probative as to the class claims (14a, 45a), especially given Dr. Weiner's admission on this point. App. 2113.[7] The District Court specifically rejected Plaintiffs' argument that their claims were not restricted to the promotions of Center Managers, stating that "[t]he Court . . . has imposed this limitation by virtue of its definitions of the classes certified in this action." 45a.

Plaintiffs also argue that they established a "gross disparity between the percentage of blacks in division level positions and . . . four appropriate UPS internal pools." Pet. at 21. The courts below recognized that these comparisons did not give rise to an inference of discrimination because they did not focus on the pool

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[7] Plaintiffs' claim that UPS "did not rebut" their cohort analysis (Pet. at 15) is incorrect. *See* p. 7 n.3, *supra*.

of employees from which Division Managers are chosen. 13a-15a, 44a. The Court of Appeals specifically cited *Watson*, 487 U.S. at 997, on this point, and both courts noted this Court's admonition in *Wards Cove*, that the "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." 490 U.S. at 650, quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977); *see Mayor v. Educational Equality League*, 415 U.S. 605, 620-21 (1974) (statistics "lack real meaning" when they fail to account for the qualifications for service).

Finally, Plaintiffs contend that UPS promoted more than 800 white Center Managers to Division Manager during the class period even though "there were blacks in sufficient numbers . . . to correct the underrepresentation of blacks at and above Division Manager positions." Pet. at 16. As the courts below noted, Plaintiffs' statistics are not probative because they do not take into account the fact that UPS generally made promotions to Division Manager from Center Managers within their Districts. 12a, 42a. In fact, Dr. Evans' analysis demonstrated just the opposite of Plaintiffs' claim: more blacks were promoted from Center Manager to Division Manager than would be expected considering candidates' availability for

promotions in each District, with more than 90 blacks promoted overall. App. 591, 2072-75.[8]

As the Court of Appeals properly concluded, "Plaintiffs' proof is insufficient under both the disparate-treatment and disparate-impact models" because "their evidence of racial disparities was insufficient, giving rise to no inference of discrimination." 14a, 12a. Plaintiffs also failed to establish a nationwide discriminatory policy or practice, a critical part of their case. *See, e.g., Wards Cove*, 490 U.S. at 657. The use of subjective criteria in local employment decisions cannot alone provide that proof. This Court has recognized the need of employers to consider subjective factors, and instructed that "[i]t is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing." *Watson*, 487 U.S. at 999. The Court of Appeals acted consistently and not in conflict with this precedent.

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[8] Dr. Evans' study demonstrates that Plaintiffs are incorrect in asserting that UPS admitted there was an underrepresentation of blacks at the Division Manager level. *See* Pet. at 16; App. 705, 1833. The testimony of UPS's former CEO Mr. Nelson confirmed that UPS has "a very fair promotion process" and that qualified blacks are promoted to Division Manager. 115a, 112a-13a, 117a.

III. The Court of Appeals Did Not Weigh Evidence or Otherwise Depart from This Court's Decisions Concerning Summary Judgment in Holding That Plaintiffs Did Not Proffer Probative Evidence of Each Element of Their Claims.

Plaintiffs contend that the Court of Appeals improperly "weighed the evidence, made credibility determinations, drew inferences in UPS's favor, and actually found non-existent facts in both the class pay and promotion cases." Pet. at 22-23. As already demonstrated, the court's decision was based on the application of established law to undisputed facts. It did not contravene any precedents of this Court concerning judicial proceedings on summary judgment.

The Court of Appeals specifically recognized and followed this Court's holding in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), cited at 20a, that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Plaintiffs are incorrect in stating that the court "acknowledged" that it weighed the evidence. *See* Pet. at 22. Rather, the court's analysis was based on this Court's additional stricture in *Anderson* that "there must be evidence on which the jury could reasonably find for the plaintiff." 477 U.S. at 252, quoted at 10a.

As was explained in *Anderson*, if evidence produced by the nonmoving party "is merely colorable or is not significantly probative, summary judgment may be granted." 477 U.S. at 249-50 (citations omitted).

In granting and affirming summary judgment for UPS, the courts below did not weigh the evidence or intrude into the province of the factfinder. Summary judgment was proper because Plaintiffs did not produce sufficient probative evidence for a reasonable jury to infer that UPS discriminated against Center Managers as a group on either pay or promotion through a nationwide discriminatory policy or practice.

Plaintiffs have had every opportunity to prove their case since filing this action in 1994 but were unable to proffer sufficient evidence to give rise to a reasonable inference of classwide discrimination. Their statistical analyses of pay were flawed due to the failure to take into account major factors that influence Center Managers' pay, which their expert acknowledged eliminated any disparity. Their other expert's analyses demonstrated no difference in promotions from Center Manager to Division Manager. On both pay and promotion, Plaintiffs failed to bring "cold numbers convincingly to life," *Teamsters*, 431 U.S. at 339, quoted at 26a, by producing any anecdotal evidence of intentional discrimination.

Given Plaintiffs' own experts' conclusions that there was no differential in Center Managers' pay when past pay factors are considered and no discrimination in Center Managers' promotions, it would be unreasonable to infer a nationwide pattern or practice of discrimination by UPS. Moreover, Plaintiffs have never alleged a specific nationwide policy or practice that caused such discrimination. Instead, they claim overly subjective decisionmaking by individuals in

more than 60 decentralized and autonomous Districts. As discussed earlier, use of subjective factors is not a discriminatory practice, and decentralization argues against the existence of a nationwide policy.

In short, the Court of Appeals understood the well-established summary judgment standard and properly applied it in affirming judgment in favor of UPS.

CONCLUSION

Because the Court of Appeals correctly applied the law of this Court in holding that Plaintiffs did not establish a *prima facie* case of nationwide discrimination as to Center Managers' pay or promotion, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 25, 2005.

(3)

No. 04-1123

IN THE

Supreme Court of the United States

LESLIE MORGAN, KENNETH STACKER, AND THEODORE BOLDIN, ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT, PETITIONERS

v.

UNITED PARCEL SERVICE OF AMERICA, INC., AND UNITED PARCEL SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Respondent's Brief in Opposition to the Petition for *Writ of Certiorari*, hereinafter UPS's Response, seriously distorts facts and blatantly mis-cites law necessitating a reply by Petitioners.

United Parcel Service, hereinafter UPS, has for eleven years fought certification of the class of 500 black Center Managers. In its Response UPS refers multiple times both explicitly and implicitly to its contention that the class should not have been certified because of "decentralized" control. (*See* UPS's Response, pp. 1-3, 10, 14-15, 20, 22-23) The district court certified the class in part because of UPS's policy of vesting District Managers with "unfettered authority regarding promotions [resulting] in the discriminatory treatment of black salaried employees across the United States." (Cert. App. 73a) The district court specifically disagreed with UPS's argument that decentralized decisionmaking could defeat certification of a class. (Cert. App. 74a) The class was and remains certified and is entitled to have its claims heard and the controlling Supreme Court law applied. Plaintiffs have proved their claims, and nothing UPS says in its Response negates Plaintiffs' unrebutted proof.

UPS's Response blatantly misrepresents the facts of *Bazemore v. Friday*, 478 U.S. 385 (1986) to support the Eighth Circuit's refusal to apply *Bazemore's* clear holding that past pay cannot be a defense to present statistically significant disparate pay of black Center Managers. *Bazemore*, 478 U.S. at 395. *See also National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 111-112 (2002).

To allow the Court of Appeals' promotion opinion to stand is to offer a handbook for avoiding promotion of blacks to highest level management in companies which promote from within: a company may, says the Eighth Circuit, retard the multi-step advancement of its black employees and still be declared free from liability for not moving black employees as fast or far upward as similarly situated white employees. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 989 (1988). This Court should supervise the Eighth Circuit and declare invalid its formula for employers who promote from within to create and maintain discriminatory underrepresentation of black employees. S. Ct. Rule 10a.

I. *BAZEMORE* MANDATES REVERSAL OF THE EIGHTH CIRCUIT MAJORITY OPINION

UPS echoes the Eighth Circuit Panel Majority in claiming that its expert's finding a statistically significant pay disparity[1] in every year but 1995 should be disregarded because of the absence of sufficient performance data. That claim is without merit: in 1991 and 1992 UPS did not use performance to determine Center Manager salaries; in 1993 there was only one year of performance data to use and all of the experts

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[1]In UPS's Footnote 2 at p. 4 of its Response regarding base pay, UPS admits it misled the Court of Appeals to believe that "base pay" as used in this case was the manager's salary at promotion. In fact all of the experts referred to base pay as the manager's yearly salary without the stock award (MIP) or half month bonus. (*See e.g.* [Weiner] A503, 505, 513, 515; [Stapelton] 482, 490, 491, 492; [Evans] 570, 571; [Greenberg] S.A. 527, 537, 617)

used it; in 1994 there were two years of past performance data to use and all of the experts used it; in 1996 and 1997 UPS's expert, Dr. David Evans, had access to one and two years' more past performance ratings than he had for 1995. Presumably Dr. Evans ran all the regressions he intended to run and he found statistically significant disparity in each year except 1995. (Cert. Pet. pp. 9-11)

UPS's expert's finding regarding "discrimination" was, of course, improper: experts do not determine whether or not there is discrimination. Whether or not discrimination exists is the ultimate legal question--to be determined by a jury, or by a court only if no question of fact exists[2] or if no rebuttal is made to a plaintiff's *prima facie* case.[3]

In its Response UPS makes and repeats multiple times the blatantly false statement that "[b]oth sides' experts agreed there was no pay differential when past pay factors were considered." (UPS's Response p. 10. *See also* pp. 5, 14, 22) UPS's expert did not even mention "past pay" and Petitioners' expert was discussing the invalidity of UPS's expert's 1995 pay

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[2]as in the class pay case for the initial liability period of 1991-1994 and in 1996 and 1997, entitling the class to summary judgment

[3]as in the class pay case for 1995 and the class promotion case, entitling the class to summary judgment

regression.[4] UPS could have been trying to draw attention away from the fact that each regression which its own expert performed for 1991-1994, 1996 and 1997 found that UPS paid black Center Managers statistically significantly less than white Center Managers.

In its defense of the Panel Majority's creation of a non-existent "past pay" variable UPS argues that this Court in *Bazemore* rejected past pay as a variable "because the lower courts concluded that the defendant had discriminated in setting past pay." (UPS's Response pp. 12-13) This Court did not and could not have made that finding since the past pay discussed in *Bazemore* was **not** discriminatory as a matter of law: the "past pay" underpayment of blacks in *Bazemore* occurred prior to the applicability of the Act to the defendant. This Court did not say that past pay could be a variable. Rather, this Court found that the pay that was disparate but **not** unlawful in the past did not constitute a defense to current pay disparity. *Bazemore*, 478 U.S. 385 at 398-403. UPS's Footnote 5 on page 13 is very telling: the fact is that Plaintiffs did make a *prima facie* case of pay disparity and UPS did not make a defense. (Cert. Pet. pp. 8-12)

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[4]UPS, having accused Plaintiffs of relying "on a portion of [its] expert's report taken out of context" (UPS's Response p. 12) when Plaintiffs are referring to his regression for six of the seven years, entirely mis-cites that portion of Dr. Stapleton's deposition where he is describing the faulty methodology of Dr. Evans for 1995.

II. PLAINTIFFS' EVIDENCE OF PROMOTION DISCRIMINATION REMAINS UNREBUTTED

Unless the Petition for *Writ of Certiorari* is granted UPS remains free to fail or refuse to promote Center Managers to and above Division Manager in sufficient numbers to change the representation of blacks. Further, allowing the Eighth Circuit Opinion to stand is a clear invitation to other employers who promote from within to do the same.

Neither UPS, nor the district court, nor the Court of Appeals found any error in the calculation of standard deviations showing a gross disparity of blacks at the Division Manager level using four conservative internal UPS pools. UPS claims only that Plaintiffs used the "wrong workpool," stating "Plaintiffs have consistently refused to understand the limitations of the classes that were certified as to promotion . . . ." (UPS's Response p. 16) It is UPS and the lower courts who have confused class membership as defined by the district court at certification with Plaintiffs' substantive claims which the district court recognized at and subsequent to certification. (*See* Cert. Pet. pp. 20-22) Plaintiffs have consistently claimed that blacks do not move from *full-time Supervisor* **to** and **beyond** *Division Manager* as fast as whites, and do not move as far upward as whites. (A77-79) The district court certified those claims and Petitioners proved them. (*See* Cert. App. 59a-63a, 73a-74a, 81a-82a; Cert. Pet. 13-20) Then the district court suddenly and inexplicably stated when ruling on summary judgment that the class claim was a one-step promotion claim from Center Manager to Division Manager--a claim Plaintiffs never

made. (Cert. App. 45a) The Eighth Circuit ratified that travesty. (Cert. App. 12a-13a) UPS urges this Court to allow it and the lower courts to disregard Plaintiffs' unrebutted and remarkable proof of race discrimination up the UPS promotion ladder. (UPS's Response pp. 15-20; Cert Pet. pp. 13-20)

In support of its arguments UPS cites to cases that deal with special qualifications or licensing issues. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Mayor v. Educational Equality League*, 415 U.S. 605 (1974). (UPS's Response p. 19) None of those cases governs a plaintiff's work pool showing in a promotion-from-within case with totally subjective selection criteria where the crucial comparison is the racial composition of the top and bottom jobs.

Plaintiffs proved those claims and was entitled to have those claims determined based on the plain language of the class complaint pled by Petitioners and the class claims defined by the district court. *See Samuel v. Northern Telecom, Inc.*, 942 F.2d 834, 837 (2nd Cir. 1991); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986).

UPS argues that the Eighth Circuit's failure to follow its own promotion decisions in *Emanuel v. Marsh*, 897 F.2d 1435 (8th Cir. 1990) and *Paxton v. Union Nat'l Bank*, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) is not one of the considerations listed in Supreme Court Rule 10. (UPS's Response p. 16) It is the Circuit's citing *Emanuel* and *Paxton* (Cert. App. 14a) as the law of the Eighth

Circuit[5] and then defying that law which cries for this Court to exercise supervision under Supreme Court Rule 10a on behalf of 500 black Center Managers.[6]

In a transparent effort to draw this Court's attention from the reality that UPS did not and could not rebut Plaintiffs' clear showing of promotion discrimination under the law of the Eighth Circuit and of this Court (Cert. Pet. 13-20), UPS claims "[b]oth sides' experts concluded that there was no discrimination in the promotion of Center Managers to Division Manager." (UPS's Response p. 6. *See also* pp. 16, 22)[7] However, shortly after UPS makes its outrageous mis-statement it refers to Dr. Weiner's cohort analysis (*Id.*) at p. 7), which stands unrebutted and shows it took blacks at UPS longer to reach upper level management than whites. (*See* Cert. Pet. p. 15)

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[5]The district court ignored *Paxton*, *Emanuel*, *Bazemore*, *Watson* and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[6]The district court had recognized those claims until days before trial was scheduled to begin, when UPS submitted a list of over 600 witnesses, some of whom were dead, and over 1,400 exhibits consisting of tens of thousands of pages. (A53, Dkt. Entry 416; A55, Dkt. Entry 441)

[7]UPS's only citation to Plaintiffs' expert's report (UPS's Response p. 17) is to one line of her rebuttal report in which she said the test she had done in her first report regarding the zero districts was done improperly and the test did not show the pattern she reported in her first report. The fact that "[b]oth courts below relied on" that statement (*Id.*) shows how improper those lower court decisions are: Plaintiffs did not offer that test as statistical proof of their claims.

UPS inaccurately asserts in its Response that the class has failed to introduce anecdotal evidence. (UPS's Response p. 22) UPS inadvertently, at pages 17 through 18 of its brief, in fact refers to powerful anecdotal evidence. The legally significant fact concerning UPS's total failure to promote blacks in 45 of some 60 districts is not how frequently Center Managers transfer out of their districts, but that District Managers who are responsible for promotion of blacks to Division Manager move from district to district. Of 28 District Managers who promoted employees to Division Manager level in their districts, 24 promoted no blacks. (App. 1283-1311) Those 24 District Managers were assigned by UPS to 53 different districts. (*Id.*) In those 53 districts subjective decisionmaking impacted adversely nationwide on the promotion of blacks in management at UPS: this fact supplements the unrebutted statistical evidence of nationwide discrimination under both Plaintiffs' disparate impact and disparate treatment models. (Cert. Pet. 13-20)

Contrary to UPS's Response at page 22, the class introduced copious additional nationwide anecdotal evidence:

- excerpts from transcripts of Class Certification Hearing (App. 166-205, 983-1043);

- evidence found by the district court at Class Certification (Cert. App. 74a), based on charts showing blacks did not move as fast from Supervisor to Center Manager

and from Supervisor to Division Manager. (App. 244, 254-257);

- affidavits of black management employees introduced at the Class Certification Hearing (App. 218-243, 156-165);

- Kent ("Oz") Nelson deposition, CEO during liability period--admission that blacks are underrepresented in upper level management (Cert. App. 110a-117a);

- excerpts from management deposition testimony (App. 1319-1803); and

- allegations in EEOC Charges (App. 816-953, 118-126).

In addition to the anecdotal evidence listed above, over 50 class members were prepared to testify at trial and UPS had deposed most of them. (Class Witness List, App. 54, Dkt entry 435. *See also* App. 1059-1160, containing summary of testimony)

III. NO COURT MAY WEIGH EVIDENCE AT SUMMARY JUDGMENT

UPS erroneously concludes in its Response that the lower courts did not weigh evidence. (UPS's Response pp. 21-23) UPS's conclusion is not supported by the lower courts' opinions. UPS did not respond to the fact that the Eighth Circuit Panel Majority stated a court ". . . can use the scale to a limited degree." (Cert. Pet. pp. 22-23) The purpose of using any scale is to weigh whatever is placed on the scale. The Eighth

Circuit said it placed evidence on a scale: the Eighth Circuit impermissibly weighed evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

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